L I C H T E N & L I S S - R I O R D A N , P. C.

ATTORNEYS AT LAW

HAROLD L. LICHTEN×
SHANNON LISS-RIORDAN×△◊
SARAH SCHALMAN-BERGEN▪
MATTHEW W. THOMSON×
ADELAIDE H. PAGANO×
THOMAS P. FOWLER×◊
BRADLEY MANEWITH•

OLENA SAVYTSKA×
ZACHARY RUBIN×◊^♦
MATTHEW PATTON×
KRYSTEN CONNON^▪
MATTHEW CARRIERI×
MEL GONZALEZ◊
JANE FARRELL△
BENJAMIN J. WEBER× OF COUNSEL

729 BOYLSTON STREET, SUITE 2000
BOSTON, MASSACHUSETTS 02116

TELEPHONE 617-994-5800
FACSIMILE 617-994-5801

WWW.LLRLAW.COM

× ADMITTED IN MASSACHUSETTS
△ ADMITTED IN CALIFORNIA
◊ ADMITTED IN NEW YORK
▪ ADMITTED IN PENNSYLVANIA
• ADMITTED IN ILLINOIS
^ ADMITTED IN NEW JERSEY
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June 7, 2023

VIA EMAIL

Ms. Sheri F. Eisner, Esq.
Senior Vice President and General Counsel
JAMS

Re: Twitter, Inc.'s Request for Universal Discovery Protocol

Dear Ms. Eisner:

We write to respond in opposition to the May 31, 2023, letter from Twitter, Inc. and X Corp. (collectively, "Twitter")[1], which seeks to impose upon our clients a universal discovery protocol that they have not agreed to and which violates the parties' arbitration agreements, JAMS Rules, and longstanding legal precedents.

As Twitter's letter points out, our firm currently represents nearly 2,000 former employees pursuing claims in connection with their separation of employment from Twitter. Although these claims were initially brought through class actions in federal court, our clients only now find themselves pursuing individual arbitration proceedings because Twitter moved for, and the court granted, an order to compel individual arbitrations pursuant to Twitter's dispute resolution agreement.

In moving to compel individual arbitration, Twitter argued before the court, "Because the plain language in the Agreements clearly prohibits arbitration on a class basis, and because such waivers are enforceable as a matter of law, the Court should compel each Plaintiff, individually,

[1] Letter from Sari M. Alamuddin, Counsel for Respondents, to Sheri F. Eisner, Senior Vice President and General Counsel, JAMS (May 31, 2023).

to submit his or her claims to arbitration on an individual basis only."[2] Accepting Twitter's arguments, the court "ordered [Plaintiffs] to arbitration on an individual basis."[3]

Yet now that our clients are on the precipice of finally having the opportunity to vindicate their rights through the very individualized arbitrations the company contractually agreed to and pressed the federal judiciary to require, Twitter has flipped its position, urging in its May 31, 2023, letter that we have suddenly "arrived at an inflection point for these mass arbitrations" and that "[t]hese arbitrations require a consolidated discovery protocol."[4] In other words, now that Twitter will actually have to answer for each of our clients' injuries, and do so in a way that it insisted on, the company seems to regret "agree[ing] to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis,"[5] "agree[ing] that any arbitration will be limited to the claims between Employee and the Company individually,"[6] and urging the federal "Court [to] compel Plaintiffs to arbitrate their claims on an individual basis."[7]

The universal discovery protocol Twitter seeks to foist upon our clients, however, is unavailable for several reasons.

First, these arbitration proceedings are governed by our clients' arbitration agreements with Twitter, and these agreements explicitly prohibit consolidated proceedings. Federal law requires JAMS to give effect to these prohibitions.

Second, JAMS Rule 6, by its plain language, does not permit Twitter's novel conception of a consolidation that consists of "only coordination of discovery."[8] Instead, JAMS Rule 6 (subsection e) states: "*Unless the Parties' agreement or applicable law provides otherwise*, JAMS may consolidate Arbitrations in the following instances…." (emphasis added). Here, the parties' agreement and applicable law provide otherwise — they do not allow consolidation.

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[2] Def. Twitter, Inc.'s Notice of Mot. and Mot. to Compel Arbitration and Strike and/or Dismiss Class Claims, 11, *Cornet et al v. Twitter, Inc.,* No. 3:22-cv-06857-JD (C.D.Cal), attached as Exhibit 1.

[3] Order on Arbitration, 5, *Cornet et al v. Twitter, Inc.,* No. 3:22-cv-06857-JD (C.D.Cal), attached as Exhibit 2.

[4] Alamuddin Letter, *supra* n.1 at 6.

[5] Def. Twitter's Mot. To Compel Arbitration, *supra* n.2 at 5 (quoting arbitration agreements).

[6] *Id.* (quoting arbitration agreements).

[7] *Id.* at 7.

[8] Alamuddin Letter, *supra* n.1 at 6.

Furthermore, the instances described next in the rule contemplate full consolidation before one arbitrator, not partial consolidation as Twitter has requested just for purposes of discovery.

Third, this universal discovery protocol that Twitter has proposed is simply not necessary. Individual arbitrations are already proceeding efficiently without it. Indeed, in our initial arbitrations (including Ms. Pan's, which was referred to in Twitter's letter), the parties have already agreed that discovery (including depositions) can be shared across cases and that the parties will cooperate to minimize any duplicative discovery and bring any disputes they cannot resolve over such issues to the arbitrators overseeing the cases as necessary. As these cases proceed, the parties may reach further agreements to promote efficiency, but there is no basis nor justification to force a universal discovery plan on claimants who have not agreed to it.

Forcing all claimants in these actions (irrespective of their self-chosen counsel and their discrete litigation strategies) into a universal discovery protocol that they have not agreed to would eviscerate the individualized nature of these arbitrations, frustrate and prejudice claimants' rights to pursue their claims as they and their chosen counsel deem best, and undermine the central purposes of bilateral individual arbitration.

I. The Arbitration Agreements and the FAA Prohibit Twitter's Proposal

The parties' "arbitration agreements all expressly state that they are governed by the" Federal Arbitration Act ("FAA"), 9 U.S.C. § 2.[9] The United States Supreme Court has made clear that the FAA reflects "both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.' In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citations omitted). "[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Under the FAA, "an arbitrator 'has no general charter to administer justice for a community which transcends the parties' but rather is 'part of a system of self-government created by and confined to the parties.'" *Id.* at 683 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)).

In giving meaning to these broad legal principles, the Supreme Court has "held that an arbitration panel exceed[s] its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation." *AT&T Mobility*, 563 U.S. at 347 (citing *Stolt-Nielsen* 559 U.S. at 684–87). The Court has further held that when an arbitration

[9] Order on Arbitration, *supra* n.2, at 2.

agreement is "silent on the question of class procedures, [it] could not be interpreted to allow them because the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 686).

But the agreements at issue are not silent on the issue of collective or class arbitration procedures; all of them expressly prohibit such procedures.[10] For instance, the agreement between Twitter and Jessica Pan — the one claimant Twitter referenced in its May 31 letter[11] — states:

> **You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis.** Employee and the Company agree that any arbitration will be limited to the claims between Employee and the Company individually. Employee acknowledges and agrees that Employee and the Company are each waiving the right to participate as a plaintiff or class member in any purported class action, collective action or representative action proceeding ("Class Action Waiver")…. [T]he Class Action Waiver shall be enforced in arbitration on an individual basis as to all other claims to the fullest extent possible and the claims to be litigated in court shall be stayed pending the completion of the arbitration on the arbitrable claims.[12]

Given that the Supreme Court has held arbitration panels that permitted class or collective proceedings to have violated the FAA when the agreements were *silent or ambiguous* on the issue, *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019), it is clear that collective proceedings where the agreements expressly prohibit such proceedings are likewise unlawful. Lest there be any doubt, one need only look to the litany of federal courts opinions that have considered this issue.[13] As the Seventh Circuit has explained:

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10 *See* Def. Twitter's Mot. To Compel Arbitration, *supra* n.2 at 5.

11 *See* Alamuddin Letter, *supra* n.1 at 3, n.5.

12 November 18, 2019 Dispute Resolution Agreement between Jessica Pan and Twitter, Inc. (emphasis in original), attached as Exhibit 3.

13 *E.g.*, *Weyerhaeuser Co. v. W. Seas Ship. Co.*, 743 F.2d 635 (9th Cir. 1984) (holding consolidation of arbitration proceedings is only permissible under the FAA where explicitly stipulated by contract); *Lefkovitz v. Wagner*, 395 F.3d 773 (7th Cir. 2005) (same); *Consolidation Coal Co. v. United Mine Workers of America, Dist. 12, Local Union 1545*, 213 F.3d 404 (7th Cir. 2000) (same); *Connecticut Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771 (7th Cir. 2000) (same); *Baesler v. Cont'l Grain Co.*, 900 F.2d 1193 (8th Cir. 1990) (same); *Del E. Webb Const. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987), *overruled on other grounds by Pedcor Mgt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) (same); *Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989) (same); *Georgia Cas. & Sur. Co. v. Excalibur Reinsurance Corp.*, 4

> Selection of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process. The fact that a party has consented to arbitrate one dispute before Arbitrator Smith and an unrelated dispute, albeit with the same antagonist, before Arbitrator Jones doesn't mean that he's agreeable to having Jones arbitrate the first dispute or Smith the second.

Lefkovitz v. Wagner, 395 F.3d 773 (7th Cir. 2005). And as the Ninth Circuit, after quoting the FAA, has further elaborated:

> [W]e can only determine whether a written arbitration agreement exists, and if it does, enforce it 'in accordance with its terms'…[This understanding of the FAA] 'comports with the statute's underlying premise that arbitration is a creature of contract, and that "[a]n agreement to arbitrate before a special tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).' Thus, the only issue properly before this Court is whether Weyerhaeuser, Karlander, and Trans-Pacific are parties to a written agreement providing for consolidated arbitration. As already indicated, they are not. Consequently, the decision of the district court [denying consolidation] must be affirmed.

Weyerhaeuser Co. v. W. Seas Ship. Co., 743 F.2d 635 (9th Cir. 1984). The Northern District of California has further elaborated:

> The overriding principle is clear. Under traditional principles of contract interpretation as well as Section 4 of the FAA, unambiguous contracts are enforced according to their terms. Courts interpret contracts as made by the parties and do not make new ones for them. *Quad Construction, Inc. v. Wm. A. Smith Contracting Co., Inc.*, 534 F.2d 1391, 1394 (10th Cir.1976). In the instant matter, Petitioners ask this Court to ignore the express provisions of the arbitration agreements and order a single proceeding. However, despite the fact that consolidated arbitration proceedings might be more economical and convenient, Petitioners cannot…create in effect a new contract that they did not make initially.

Hyundai America, Inc. v. Meissner & Wurst GmbH & Co., 26 F.Supp.2d 1217, 1219–20 (N.D.Cal.,1998).

The takeaway of this wealth of caselaw is clear: Twitter's novel attempt at unilaterally subjecting individual claimants to a collective arbitral discovery process is plainly barred by its own arbitration agreements with claimants, pursuant to the FAA. Pursuant to the parties'

F.Supp.3d 1362 (N.D.Ga. 2014) (same); *Certain Underwrities at Lloyd's v. Century Indem. Co.*, No. CIV.A.05-2809, 2005 WL 1941652, at *2 (E.D. Pa. Aug. 1, 2005) (same); *Matter of Arb. Between Coastal Shipping Ltd. & S. Petroleum Tankers Ltd.*, 812 F. Supp. 396 (S.D.N.Y. 1993) (same); *Ore & Chemical Corp. v, Stinnes Interoil, Inc.*, 606 F.Supp. 1510 (S.D.N.Y. 1985) (same).

agreements, arbitrator selection is underway in these cases. There is no provision in the agreement for selection of separate arbitrators (or an arbitrator panel, as Twitter proposes) to oversee discovery issues.

II. JAMS Rule 6 Does Not Allow for Twitter's Collective Discovery Scheme

As noted above, the consolidation provisions of JAMS Rule 6 are not applicable to these disputes. Rule 6 reads, "Unless the Parties' Agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances…" JAMS Employment Arbitration Rules & Procedures, Rule 6(e). The parties' agreements and applicable law *do* provide otherwise — they prohibit collective proceedings.

The agreements further displace Rule 6 in another important respect. While Rule 6 provides that "JAMS" may consolidate arbitration cases — again, "[u]nless the Parties' Agreement or applicable law provides otherwise" — and Rule 1 further provides that "[t]he authority and duties of JAMS as prescribed in the Agreement of the Parties and in these Rules shall be carried out by the JAMS National Arbitration Committee ('NAC') or the office of JAMS General Counsel or their designees," the arbitration agreements have displaced *the NAC and General Counsel's* authority to consolidate these cases for discovery and have instead vested authority over discovery disputes in the individual arbitrators. The agreements provide, "In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence to present their cases and defenses, **and any disputes in this regard shall be resolved by the Arbitrator**."[14] As such, JAMS lacks the authority generally to resolve disputes over discovery protocols. Instead, these must be submitted to the individual arbitrator in each case.[15]

---

[14] Twitter Dispute Resolution Agreement, *supra* n.12 at 2 (emphasis added), attached as Exhibit 3.

[15] *Cf. Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246 (N.D. Cal. 2019), *aff'd*, 823 Fed. Appx. 535 (9th Cir. 2020) (unpublished) (holding that where arbitration agreement specifically delegates issue to arbitrator, only arbitrator can decide it in the first instance); *McClenon v. Postmates Inc.*, 473 F. Supp. 3d 803 (N.D. Ill. 2020) (same).

Of course, under Supreme Court precedent, each arbitrator only has authority over the matter properly before him or her, as "an arbitrator 'has no general charter to administer justice for a community which transcends the parties.'" *Stolt-Nielsen*, 559 U.S. at 683 (quoting *Warrior & Gulf Nav. Co.*, 363 U.S. at 581). This, too, manifests the parties' intents to preclude collective discovery and forecloses Twitter's attempts at side-stepping the individual arbitration proceedings it has forced on claimants.

Further, Rule 6 also does not permit the sort of piecemeal consolidation Twitter urges. In its May 31 letter, Twitter — without fully quoting the rule — urges that it "does not seek full consideration of all employee arbitrations, but rather, more modestly, only coordination of discovery, a lesser form of relief within the scope of Rule 6. See Rule 6(e)(ii) (permitting consolidation of 'proceedings')." In actuality, Rule 6(e)(ii) provides:

> Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide **that the new case or cases** shall be consolidated **into one or more of the pending proceedings** and referred to one of the Arbitrators or panels of Arbitrators **already appointed**.

JAMS Employment Arbitration Rules & Procedures, Rule 6(e)(ii) (emphasis added). By its plain text, Rule 6(e) only allows for the full consolidation of "cases…into one or more of the pending proceedings." It does not allow a party to secure a strategically-tailored consolidation of discrete aspects of arbitral proceedings.

Other JAMS Rules would similarly be violated by imposition of the sort of discovery process Twitter urges. For example, Rule 17 provides that "[e]ach Party may take at least one deposition of an opposing Party or an individual under the control of the opposing Party" and that while "[t]he Parties shall attempt to agree on the number, time, location, and duration of the deposition(s)[, a]bsent agreement, the Arbitrator shall determine these issues." Yet the proposed protocols outlined in Exhibit A to Twitter's May 31 letter would require the parties to relinquish these rights.

Twitter selectively quotes a recent article by JAMS President Kimberly Taylor in support of its proposition that the version of consolidation it promotes is necessary for adjudicating these claims.[16] But the actual article by Ms. Taylor repudiates the very tactics Twitter is trying to pursue here. In the article, Ms. Taylor explains JAMS' proper role in mass arbitrations like the ones at issue:

> Following [the Supreme Court's *Epic Systems Corp. v. Lewis*] decision, and in the face of an arbitration clause that bars class or collective actions, attorneys representing employees or consumers have responded in some instances by filing dozens, hundreds or even thousands of individual arbitration demands against a single company. These filings have prompted questions from Claimants' and Respondents' counsel about how ADR providers will administer the matters, what fees apply and whether providers will impose specialized processes that may run counter to the specific terms of the parties' contract…
>
> JAMS understands the complexities of the situation. However, we have a fundamental responsibility and commitment to neutrality and high ethical and professional standards. Our role as the administrator of the parties' arbitration proceedings prohibits us from modifying or changing the arbitration agreement

[16] *See* Alamuddin Letter, *supra* n.1 at 6.

> absent express agreement of the parties. If the parties' agreement prohibits class actions and consolidations, we must treat each case individually. Each matter is commenced and managed separately because that is what the pre-dispute contract requires. Every arbitration receives its own process and its own arbitrator, and the resources needed to manage these individual arbitrations are similar to or greater than any individual arbitration.
>
> JAMS has developed internal protocols to make the commencement process as efficient as possible, including maximizing the use of technology and creating a dedicated team to oversee the commencement of the arbitration and appointment of the arbitrator. We aim to fulfill the goal of arbitration—an efficient, fair and neutral proceeding that leads to a final arbitration award that will be upheld in court. JAMS will not reduce fees for either side to avoid even an appearance of impartiality or bias. Every individual arbitration receives individual treatment and an individual award to ensure the parties receive an impartial, neutral and fair process…
>
> **JAMS can work with the parties to implement any processes or procedures that have been agreed upon prior to or even after an arbitration has been filed. However, in the absence of an agreement amongst the parties, the arbitration agreement controls.**
>
> To reiterate, JAMS' core value is neutrality. We take each individual arbitration as it is filed, according to the terms of the contract. We take that position to maintain our neutrality and because we do not believe we have the power, as the administering body, to change the parties' agreement unilaterally.

Insight from the President: JAMS Policy Regarding Mass Arbitration Filings, attached here as Exhibit 4 (emphasis added).

Twitter's attempt at imposing a universal discovery protocol is inconsistent with the parties' agreements to arbitrate these claims individually pursuant to the JAMS Rules. As such, it must be rejected.

III. Twitter's Universal Discovery Protocol Is Unnecessary, Would Prejudice Claimants, and Would Frustrate the Benefits of Individual Arbitration

Twitter presses that its universal discovery proposal is "necessary [] to eliminate duplicative discovery, prevent inconsistent prehearing rulings, and conserve the resources of the parties, their counsel, JAMS, and its arbitrators."[17] But this contention is belied by ongoing arbitration proceedings (covered by Twitter's proposal) that are already proceeding smoothly, by JAMS Rules that are designed (and were agreed to by the parties) to mitigate abuse of the discovery process and by the parties' (and JAMS') representations.

[17] *See* Alamuddin Letter, *supra* n.1 at 6.

First, individual arbitrations are already progressing efficiently without Twitter's proposed protocols. Initial conferences have already been held in some of our cases, in which hearing dates have been set by their respective arbitrators. In each of our cases that have proceeded to an initial conference, we have agreed with Twitter to be efficient in discovery and bring disputes to the arbitrator if we cannot reach agreement. For example, in the *Pan* matter, the parties have agreed to the following clause in the scheduling order, which has also been accepted by the Arbitrator:

> Without waiving any potential objections to admissibility at the Final Arbitration Hearing or other proceeding, in an effort to promote overall efficiency, the parties agree that any evidence produced in another court case and/or arbitration between Respondents and Plaintiffs/Claimants represented by Lichten & Liss-Riordan, P.C. (including deposition or hearing testimony) may be used in this arbitration without having to be requested/produced again in discovery. Similarly, the parties agree that any evidence produced in this arbitration (including deposition and hearing testimony) may be used in another court case and/or arbitration between Respondents and Plaintiffs/Claimants represented by Lichten & Liss-Riordan, P.C. without having to be requested/produced again in the other matter, subject to and without waiving any potential objections to admissibility based upon the applicable evidentiary rules in the venue where such evidence is sought to be used.

Scheduling Order, 2, JAMS Reference No. 1100115270 (*Jessica Pan v. Twitter, Inc. et al*), attached as Exhibit 5. The Scheduling Order continues:

> In light of this agreement outlined in the above paragraph, the parties shall reasonably and in good faith attempt to avoid requesting discovery that is unnecessarily duplicative of discovery conducted in another arbitration and/or court case. In order to depose a witness again who has already been deposed in another arbitration and/or court case in which Plaintiffs/Claimants are represented by Lichten & Liss-Riordan, P.C., the party seeking the deposition shall identify good cause to depose that witness again.
>
> If a potential discovery issue arises, the parties shall meet and confer in good faith in an attempt to resolve the issue. If the issue cannot be resolved, the parties shall submit a joint letter (of no more than 10 pages) to the Arbitrator outlining their dispute.

Id. Thus, the parties — consistent with the JAMS Rules and under the supervision of a neutral arbitrator familiar with the parties' unique claims, circumstances, and theories of liability — have been able to work collaboratively towards developing appropriate discovery protocols that allow our client to pursue discovery needed for her claims. This is the proper, consensual course of action for individual arbitration proceedings, and it comports with Ms. Taylor's statement on behalf of JAMS regarding mass arbitrations.

At the same time, the JAMS Rules already provide a latticework of safeguards to prevent abusive discovery tactics. *See, e.g.*, JAMS Rule 17 ("Absent agreement, the Arbitrator shall determine these issues, including whether to grant a request for additional depositions, based upon the reasonable need for the requested information, the availability of other discovery and the burdensomeness of the request on the opposing Parties and the witness."). These safeguards — and not the unilateral, employer-friendly procedures Twitter proposes — are adequate to prevent abusive or excessive discovery.

On the other hand, were JAMS to accept Twitter's proposal, the potential for delays and unfairness would be accentuated. Its protocol would govern across all claims and all claimants, even those represented by distinct counsel. However, what might be relevant in one case might not be relevant in another, and yet claimants would be forced to wait for these issues to be adjudicated before proceeding, without getting the benefit of a ruling from the arbitrator overseeing their particular case. As the United States Supreme Court has explained, doing so could frustrate the purposes of bilateral, individualized arbitration. *See AT&T Mobility*, 563 U.S. at 348 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."). To inflict delays (which are part-and-parcel to a collective discovery dispute resolution process) would be antithetical to the aims of individualized arbitration. Indeed, in our cases, Twitter has already asked that arbitrators defer scheduling hearings until after a universal discovery protocol is established and have proposed that no hearings occur until the full universal discovery is complete. The mere fact that many Twitter employees have brought similar claims should not delay individual cases that are already moving forward and can be scheduled for hearing expeditiously.

At the same time, extending a universal discovery protocol across claimants who are represented by different counsel would invite its own set of issues. Claimants are entitled to "be represented by counsel or any other person of the Party's choice." JAMS Rule 12(a). "The choice of counsel is an intensely personal choice." *United States v. Cardozo*, 21-1779, 2023 WL 3674131, at *9 (1st Cir. May 26, 2023). Imposing universal constraints for depositions spanning all claims could impermissibly limit our clients to discovery obtained by different counsel not of their choosing and has the potential to prejudice our clients, confuse the issues, and create unnecessary conflicts.

Tellingly, these are largely issues that would only affect individual claimants and not Twitter. Through its proposal, Twitter seeks the benefit and ease of engaging in discovery just "once," as it would in a class action in court, but requires all the claimants to participate in individualized discovery. Twitter's proposal ignores the fundamental context of these arbitrations: thousands of individuals are pursuing individual claims against Twitter due to Twitter's own (successful) effort to force them to be heard separately. Twitter, by its own volition, chose to promulgate, sign, and enforce individual arbitration agreements that prohibit collective arbitration proceedings, and now that accountability is imminent, the company is

having second thoughts. But the FAA, core principles of contract law, the JAMS Rules, and Twitter's own arbitration agreements are crystal clear: Twitter has made its bed, and it must now sleep in it.

IV. Conclusion

For the foregoing reasons, on behalf of our clients whose cases have been filed with JAMS, we object to Twitter's proposal that these cases be forced into a universal discovery protocol that our clients have not agreed to. It was Twitter that demanded that these cases proceed individually in arbitration, and it cannot now "have its cake and eat it too" by limiting the rights our clients have in arbitration to proceed individually in their cases (including for discovery) if they so choose.

Sincerely,

/s/ Shannon Liss-Riordan

cc: Twitter's counsel
Other Claimants' counsel

Exhibit 1

MORGAN, LEWIS & BOCKIUS LLP
Eric Meckley, Bar No. 168181
eric.meckley@morganlewis.com
Brian D. Berry, Bar No. 229893
brian.berry@morganlewis.com
Ashlee N. Cherry, Bar No. 312731
ashlee.cherry@morganlewis.com
One Market
Spear Street Tower
San Francisco, CA 94105-1596
Tel: +1.415.442.1000
Fax: +1.415.442.1001

Attorneys for Defendant
TWITTER, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

EMMANUEL CORNET, JUSTINE DE CAIRES, GRAE KINDEL, ALEXIS CAMACHO, AND JESSICA PAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

TWITTER, INC.,

Defendant.

Case No. 3:22-cv-06857-JD

DEFENDANT TWITTER, INC.'S NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION AND STRIKE AND/OR DISMISS CLASS CLAIMS

MEMORANDUM OF POINTS AND AUTHORITIES

Date: December 29, 2022
Time: 10:00 a.m.
Judge: Hon. James Donato

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Thursday, December 29, 2022, at 10:00 a.m. or as soon thereafter as may be heard in Courtroom 11 of this Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Twitter, Inc. ("Twitter"), will and hereby does move this Court for an Order compelling Plaintiffs Emmanuel Cornet, Justine de Caires, Grae Kindel, Alexis Camacho, and Jessica Pan (collectively "Plaintiffs") to arbitrate the claims alleged in this action on an individual basis and to strike and dismiss Plaintiffs' alleged class action claims. Each named Plaintiff clearly and unequivocally agreed to arbitrate any employment-related disputes with Twitter on an individual basis only. In contravention of their agreements, Plaintiffs have alleged employment-related claims in a putative class action against Twitter. Because Plaintiffs have refused to abide by their arbitration agreements, Twitter must seek relief from the Court. The arbitration agreement, including its class action waiver provision, is valid, binding, and legally enforceable under the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1 *et seq.*; *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1616, 1632 (2018). As a result, the Court should compel Plaintiffs to arbitrate their claims on an individual basis, and the Court should strike and/or dismiss their class claims.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Fidelma Callaghan and all exhibits attached thereto, the evidence to which the Court may take judicial notice, the record in this action, and any other evidence as may be presented by Twitter at or before the hearing on this Motion.

Dated: November 21, 2022

MORGAN, LEWIS & BOCKIUS LLP

By */s/ Eric Meckley*
Eric Meckley
Brian D. Berry
Ashlee N. Cherry
Attorneys for Defendant
TWITTER, INC.

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I. INTRODUCTION

Plaintiffs Emmanuel Cornet, Justine de Caires, Grae Kindel, Alexis Camacho, and Jessica Pan ("Plaintiffs") filed this putative employment class action against Defendant Twitter, Inc. ("Twitter") as a preemptive strike to disrupt Twitter's planned administration of its lawful November 4, 2022 reduction in force. Plaintiffs knew they had agreed to arbitrate their claims on an individual basis, yet purposefully chose to disregard their contractual arbitration commitments in order to file this lawsuit and unfairly prevent employees impacted by the reduction in force from having the opportunity to obtain severance benefits.[1] As this Court is aware, the Federal Arbitration Act ("FAA") and applicable United States Supreme Court precedent dictate that where, as here, a plaintiff has entered into an arbitration agreement with a class action waiver, their individual claims must be compelled to arbitration and the putative class claims dismissed. Plaintiffs cannot prosecute their claims before this Court because they agreed to binding arbitration, on an individual basis, as the exclusive means to resolve any employment-related disputes. The Court should compel Plaintiffs to arbitrate their individual claims, strike and/or dismiss their putative class action claims and dismiss this action in its entirety.

II. RELEVANT FACTUAL BACKGROUND

A. Plaintiffs Entered Into a Binding Dispute Resolution Agreement with Twitter.

When Twitter offers a job to an applicant for an employment position in the United States, a member of Twitter's Global People Services team prepares an offer packet in Twitter's internal OWL system. Declaration of Fidelma Callaghan ("Callaghan Decl.") ¶ 3. The offer packet includes the applicant's offer letter, a separate standalone Dispute Resolution Agreement, and other documents. *Id.* Twitter sends the applicant's offer packet to the applicant via the email address provided by the applicant during the application process (or their @twitter.com email address if the offer was made in connection with a conversion from an contractor role to an

[1] Along with this motion to compel arbitration, Twitter is filing its Opposition to Plaintiffs' "Emergency" Motion for a Protective Order. As explained more fully in Twitter's Opposition, Plaintiffs' putative class complaint is an artifice for Plaintiffs' counsel to invoke Rule 23(d) in an improper effort to solicit clients in connection with Twitter's lawful reduction in force.

employee position). *Id.* An applicant's offer letter explains the steps the applicant must take to accept the offer, which includes signing the offer letter and signing the Dispute Resolution Agreement (as well as other documents in the offer packet) and returning the signed documents to Twitter on or before the date on which the offer expires. *Id.* ¶ 4. While the offer letters provided to the Plaintiffs contained some differences in wording, the material terms were substantively the same. Specifically, the offer letters provided to Camacho, Kindel and De Caires stated:

> **Dispute Resolution**. We sincerely hope that no dispute will arise between us. If a dispute should arise, it can be resolved through the Company's Dispute Policy. A copy of the Dispute Resolution Policy is enclosed with this letter.

The offer letters provided to Pan and Cornet stated:

> **Dispute Resolution**. We sincerely hope that no dispute will arise between us. If a dispute should arise, it can be resolved through the Company's Dispute Policy, unless you choose to opt-out of the same pursuant to its terms. A copy of the Dispute Resolution Policy is enclosed with this letter.

The offer letters to Kindel, Camacho and De Caires stated:

> To indicate your acceptance of this offer, please initiate the authorization of your background check, and sign and date the enclosed duplicate original of this letter agreement, the enclosed Confidentiality Agreement, and the enclosed Dispute Resolution Policy and return them to [Twitter representative].

Similarly, the offer letters to Pan and Cornet stated:

> To accept this offer, please initiate the authorization of your background check, and sign and date this offer letter, and the other documents enclosed with this letter (including the Confidentiality Agreement and Dispute Resolution Agreement) and return them via Adobesign.

Id. ¶ 7(a)-(e); Exs. A-E.

In the space immediately above the location where the applicant is directed to sign, the offer letters to Kindel, Camacho and De Caires contained the following attestation: "I have read, understood and accept all the provisions of this offer of employment."[2] *Id.* When an applicant receives an electronic link to an offer letter and clicks on the link, the internet-based Adobe Sign

[2] This sentence in the offer letters to Cornet and Pan included the additional prefatory language "By signing below,".

program launches and presents the applicant with the complete offer packet in PDF format.[3] *Id.* ¶ 5. The program allows the applicant to scroll up and down to review the text of each document on the applicant's computer screen; there is no time limit on this review and the applicant can take as long as desired to read the text of each document. *Id.* The program also identifies the portions of the documents that require an applicant's signature or initials, and the program allows the applicant to apply his or her electronic signature or initials via their choice of typing, drawing, or taking a picture of their signature. *Id.* When the applicant has completed reviewing and signing the documents, the applicant is prompted to click a button that finalizes and applies the electronic signatures, which submits the entire executed packet to Twitter, and also provides a hyperlink to the documents for the applicant to download. *Id.* The Adobe Sign system also sends a copy of the signed offer packet to the applicant's email address. *Id.* ¶ 6. When Twitter receives a copy of the signed offer letter and Dispute Resolution Agreement, Twitter saves the signed documents in the applicant's personnel file. *Id.* ¶ 7(a)-(e).

Here, each of the named Plaintiffs received an offer packet from Twitter that included their offer letter and the Dispute Resolution Agreement. *Id.*, Exs. A-E. Each Plaintiff electronically signed their offer letter, and each Plaintiff separately signed their Dispute Resolution Agreement. *Id.* Each Plaintiff further manifested assent to the Dispute Resolution Agreement by remaining employed by Twitter 30 days without submitting a request to opt out of arbitration. *Id.* ¶ 8.

B. The Relevant Terms of the Dispute Resolution Agreement.

The named Plaintiffs signed three slightly different version of the Dispute Resolution Agreement ("Agreement") – Version One (signed by Kindel 2017 and Camacho 6/2018); Version Two (signed by De Caires 10/2018); Version Three (signed by Pan 2019 and Cornet 2021). *See* Callaghan Decl., Exs. A-E. The operative, material terms are substantially the same. Specifically, the Dispute Resolution Agreement provides:

- Introductory Paragraph. Versions One and Two of the Agreement state at the top

[3] Adobe Sign is a type of cloud-based electronic signature application program that allows users to send, sign, track, and manage signature processes using a browser or mobile device.

of the first page:

> "**This Dispute Resolution Agreement is a contract and covers important issues relating to your rights. It is your sole responsibility to read it and understand it. You are free to seek assistance from independent advisors of your choice outside the Company or to refrain from doing so if that is your choice.**"[4]

- Governing Law. All Versions of the Agreement expressly state that it is "governed by the Federal Arbitration Act, 9 U.S.C. § 1, et seq. and evidences a transaction involving commerce." *Id.* § 1.

- Covered Claims. Versions One and Two state that it applies to "any dispute arising out of or related to Employee's employment with Twitter, Inc. . . . or termination of employment, and survives after the employment relationship terminates. . . . [and] "also applies, without limitation, to disputes regarding the employment relationship . . . termination . . . and claims arising under . . . state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims."[5] *Id.*

- Commitment to Arbitrate Claims. Versions One and Two state: "Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial."[6] *Id.*

- Right to Opt Out. Versions One and Two explicitly state that arbitration is not a mandatory condition of an employee's employment with Twitter and provide an opt-out procedure for employees who do not want to be bound by the terms of the Agreement.

> **Arbitration is not a mandatory condition of Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement.** The Employee must submit a signed and dated statement on a "Dispute Resolution Agreement Opt Out Form" ("Form") that can be obtained from the Company's Human Resources Department at hr@twitter.com.

[4] Version Three contains this same statement, plus the following additional language: "**You can choose to opt out of this Agreement – you have 30 days to opt out**."
[5] Version Three contains the additional language in the last sentence "and any other employment-related claim."
[6] Version Three substitutes the phrase "covered disputes" for "such disputes."

> . . .
>
> An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. . .[7]

Id., Exs. C-E, § 8 (emphasis in original); Exs. A-B, § 8 (substantively the same).

- Delegation Clause. All Versions of the Agreement contain a delegation clause that authorizes the arbitrator to resolve all "disputes arising out of or relating to [the] interpretation or application of this Agreement, including the enforceability, revocability or validity of the Agreement or any portion of the Agreement."[8] *Id*., Exs. A-E § 1.

- Class Action Waiver. All Versions of the Agreement state:

> **You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis**.[9]

Id. § 5. All Versions also expressly provide that the enforceability of the class action waiver may be determined only by a "court of competent jurisdiction" and not by an arbitrator. *Id*.

- Arbitration Provider. Version One does not specify an arbitration provider. Versions Two and Three specify that the parties "agree to bring any claim in arbitration before Judicial Arbitration and Mediation Services ("JAMS"). *Id.,* Exs. C-E § 5.

[7] Version Three substitutes hr@twitter.com for hrlegaldocs@twitter.com.

[8] Version One includes the additional statements: "Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial."

[9] Version Three includes the additional sentence: "Employee and the Company agree that any arbitration will be limited to the claims between Employee and the Company individually. Employee acknowledges and agrees that Employee and the Company are each waiving the right to participate as a plaintiff or class member in any purported class action, collective action or representative action proceeding ("Class Action Waiver").

C. Despite Their Agreement to Arbitrate on an Individual Basis Only, Plaintiffs Filed a Putative Class Action in This Court.

On November 3, 2022, upon learning of Twitter's planned reduction in force, Plaintiffs filed a complaint alleging putative class claims for violation of the federal and California WARN Acts and seeking relief under the Declaratory Judgment Act. ECF No. 1. On November 8, 2022, Plaintiffs filed the operative First Amended Class Action Complaint ("FAC") alleging putative class claims for: (i) breach of contract; (ii) breach of contract (third-party beneficiary); (iii) promissory estoppel; (iv) violation of WARN Act (29 U.S.C. §§ 2101 *et seq.*); (v) violation of California WARN Act (Cal. Lab. Code § 1400 *et seq.*); and (vi) Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. ECF No. 6. Each of these claims arises out of and relates to Plaintiffs' employment with Twitter and, with the exception of Camacho, the termination thereof.

III. ARGUMENT

Where, as here, an arbitration agreement has an express "FAA choice-of-law" provision, the FAA governs the agreement. *Kim v. Tinder, Inc.*, 2018 WL 6694923, at *2 (C.D. Cal. July 12, 2018) (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1129-1131 (9th Cir. 2015)); *Rodriguez v. American Technologies*, Inc., 136 Cal.App.4th 1110, 1122 (2006). Even if the Agreement did not expressly incorporate the FAA, the FAA still applies because Twitter's business plainly "involve[es] commerce." *See* 9 U.S.C. § 2. Indeed, courts broadly construe the FAA's use of the term "involving commerce" to cover any contract affecting interstate commerce to the full extent of Congress's Commerce Clause power. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied–Bruce Terminix Cos.*, 513 U.S., at 273–274, 115 S.Ct. 834. As the Ninth Circuit has explained, "the Internet is an instrumentality and channel of interstate commerce." *U.S. v. Sutcliffe*, 505 F.3d 944, 952-53 (9th Cir. 2007) (quoting *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam)). The FAA plainly governs the Agreements at issue here.

Under the FAA, an arbitration agreement "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 US Supreme Court has mandated that arbitration agreements governed by the FAA "must be enforced as written," subject only to generally applicable contract defenses such as

fraud, duress, or unconscionability. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018). The FAA "leaves no room for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

In deciding a motion to compel arbitration under the FAA, the Court's role is limited to answering two questions: (1) does a valid agreement to arbitrate exist; and, if so, (2) does the arbitration agreement encompass the dispute or claims at issue? If the answer to both questions is "yes," then the Court must compel arbitration. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Here, because the answer to both inquiries is unequivocally "yes," the Court should compel each of the Plaintiffs individually to arbitrate their claims.

A. The Court Must Compel Plaintiffs to Arbitration on an Individual Basis

1. The Plaintiffs Assented to the Agreement Both by Signing It and by Remaining Employed for 30 Days Without Opting Out.

Courts generally apply state-law principles of contract formation when deciding whether parties assented to a contract. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1093 (9th Cir. 2014). In California, an agreement to arbitrate may be either express or implied in fact. *Davis*, 755 F.3d at 1093. "A defendant may meet its initial burden to show an agreement to arbitrate by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature to the defendant's motion to compel arbitration." *Smith v. Rent-A-Center, Inc.*, No. 118CV01351LJOJLT, 2019 WL 1294443, at *4 (E.D. Cal. Mar. 21, 2019) (quoting *Espejo v. S. California Permanente Med. Grp.*, 246 Cal.App.4th 1047, 1060 (2016)).

California enacted the Uniform Electronic Transaction, Cal. Civ. Code § 1633.1 *et seq*., which provides that a "signature may not be denied legal effect or enforceability solely because it is in electronic form[,]" and specifies that "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." Cal. Civ. Code § 1633.7(a). A defendant must show by a preponderance of the evidence that the electronic

signature on an agreement is attributable to a plaintiff (*i.e.*, that it is more likely than not it was the plaintiff's act that caused the signature to be created). Fed. R. Evid. 901(a); *see, e.g., Beckman v. Zuffa LLC,* No. CV215570MWFAGRX, 2021 WL 5445464, at *4 (C.D. Cal. Nov. 15, 2021) (granting motion to compel arbitration in employment case where the employee affixed electronic signature to the agreement using Adobe Sign). This "may be shown in any manner," including by circumstantial evidence, and it "is not a difficult evidentiary burden to meet." *Ruiz v. Moss Bros. Auto Grp., Inc.*, 232 Cal.App.4th 836, 843-844 (2014) (citing Cal. Civ. Code § 1633.9); *see also Nanavati v. Adecco USA, Inc.*, 99 F.Supp.3d at 1076 (holding that a detailed declaration "easily satisfies Defendant's low burden to authenticate Plaintiff's electronic signature and establish the existence of a valid arbitration agreement"). Fed. R. Evid. 901(b)(4) allows consideration of the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances to authenticate a document." Declarations from company representatives are sufficient to authenticate electronic signatures. *See Nanavati v. Adecco USA, Inc.*, 99 F.Supp.3d 1072, 1076 (N.D. Cal. 2014); *Jones-Mixon v. Bloomingdale's, Inc.*, No. 14-cv-01103-JCS, 2014 WL 2736020, at *4 (N.D. Cal. June 11, 2014). In *Tagliabue v. J.C. Penney Corp., Inc.*, No. 1:15-CV-01443-SAB, 2015 WL 8780577, at *3 (E.D. Cal. Dec. 15, 2015), the plaintiff disputed the validity of his electronic signature on an arbitration agreement. The employer submitted evidence regarding its onboarding system and process for new hires to complete designated steps, including electronically signing an arbitration agreement, to complete the hire process. *Id*. The court in *Tagliabue* found that this evidence, coupled with the fact the plaintiff's electronic signature appeared on other documents presented to him during onboarding, established that the plaintiff more likely than not had signed the agreement. *Id.*; *see also Beckman*, 2021 WL 5445464, at *4.

Here, Plaintiffs cannot dispute that they electronically signed their Agreements, their signatures appear on the Agreements, their signatures appear on their offer letters, and they could not have completed the process and been hired by Twitter without signing the Agreements. Callaghan Decl. ¶ 4, Exs. A-E. Plaintiffs further manifested their assent to the Agreement by remaining employed at Twitter for 30 days without submitting an opt our request. Callaghan

Decl. ¶¶ 7-8, Exs. A-E § 8 ("Should an Employee not opt out of this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company"). As a result, the Court must find that a valid agreement to arbitrate exists for each Plaintiff.

2. The Agreement Encompasses the Claims Alleged in the FAC.

To determine the scope of an arbitration agreement, the Court must look to the express terms of the parties' agreement. *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017) (citing *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). "If the text is plain and unambiguous, that is the end of our analysis in this case because we must rigorously enforce arbitration agreements according to their terms." *United States ex rel. Welch*, 871 F.3d at 796 (citations omitted). A claim is subject to arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984), *aff'd* 822 F.2d 876 (1987). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

Here, Plaintiffs' FAC alleges claims for breach of contract, promissory estoppel, violations of the federal and California WARN Act, and the Declaratory Judgment Act, all of which are premised on the Plaintiffs' employment with (and except for Camacho) termination from Twitter. FAC, pp. 8-11. Plaintiffs' contract and promissory estoppel claims are premised on Twitter's alleged failure to provide the same employment benefits and severance pay following the sale of the Company and alleged promises related to remote work. FAC, pp. 8-10. Plaintiffs' federal and California WARN Act claims arise from and relate to their alleged layoffs from Twitter their derivative claim for a declaratory judgment is predicated on the same facts. *Id.* pp. 10-111. Each of these claims falls squarely within the scope of the Agreement because they are disputes "arising out of or related to [their] employment with Twitter" and (except for Camacho) their termination. Plaintiffs cannot dispute that the claims in the FAC are covered by and subject to arbitration under the plain terms of their Agreements.

3. The Class Action Waiver is Enforceable.

Class waivers in arbitration agreements are enforceable under the FAA. Courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify *with whom* [the parties] choose to arbitrate their disputes." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (italics and brackets in original) (citations omitted). There is no "entitlement to class proceedings for the vindication of statutory rights." *Id*. at 234. The Supreme Court overruled prior California law barring enforcement of class action waivers. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-52 (2011). Recognizing that "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Supreme Court held that California law restricting class action waivers was "inconsistent with the FAA." *Id*. at 344. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. at 1632, the Supreme Court confirmed that arbitration agreements in the employment context are no exception to the rule that class waivers are enforceable under the FAA.

Here, the Plaintiffs expressly waived their right to file or participate in a class action when they entered into the Agreement. Versions One and Two state:

> **You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis**. **Accordingly, (a) There will be no right or authority for any dispute to be brought, heard or arbitrated as a class action ("Class Action Waiver").**

Version Three of the Agreement states:

> **You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis**. Employee and the Company agree that any arbitration will be limited to the claims between Employee and the Company individually. Employee acknowledges and agrees that Employee and the Company are each waiving the right to participate as a plaintiff or class member in any purported class action, collective action, or representative action proceeding ("Class Action Waiver").

Callaghan Decl., Exs. A-E § 5.

Only the Court is authorized to resolve the enforceability of the class action waiver. *See*

Id.[10] Because the plain language in the Agreements clearly prohibits arbitration on a class basis, and because such waivers are enforceable as a matter of law, the Court should compel each Plaintiff, individually, to submit his or her claims to arbitration on an individual basis only. *See, e.g., Martinez v. Ross Stores, Inc.,* No. 18-CV-04636-JD, 2019 WL 4221704, at *3 (N.D. Cal. Sept. 5, 2019) (Donato, J.) (acknowledging the validity of class action waiver); *Jacobson v. Snap-on Tools Company*, No. 15-CV-02141-JD, 2015 WL 8293164, at *6 (N.D. Cal. Dec. 9, 2015) (Donato, J.) (enforcing class action waiver and ordering plaintiff to submit his claims to arbitration on an individual basis); *Lacour*, 2021 WL 1700204 at *6 (striking class claims and compelling individual arbitration).

Further, the Court should exercise its discretion to dismiss this lawsuit given that all of the Plaintiffs' claims are subject to an arbitration agreement. *See Johnmohammadi v. Bloomingdale's, Inc.,* 755 F.3d 1072, 1074-75 (9th Cir. 2014) ("a district court may either stay the action or dismiss it out right when . . . the court determines that all of the claims raised in the action are subject to arbitration"); *Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161, 1169 (N.D. Cal. 2011) (enforcing class action waiver and dismissing lawsuit with prejudice); *Louis v. Healthsource Global Staffing, Inc.,* No. 22-CV-02436-JD, 2022 WL 4960666, at *3 (N.D. Cal. Oct. 3, 2022) (Donato, J.) (granting a motion to compel arbitration and dismissing the action).

4. The Delegation Clause Is Enforceable

Parties may agree to delegate gateway issues of arbitrability to an arbitrator so long as there is "clear and unmistakable" evidence of their intent to do so. *Momot v. Mastro*, 652 F.3d 982, 987-988 (9th Cir. 2011) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)); *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016). Here, Version One of the Agreement states:

> [T]his Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through

[10] Such a determination should be made in the Court's order compelling each Plaintiff's individual claims to arbitration, and not be deferred pending any challenges to the Agreement's enforceability. *See, e.g., Lacour v. Marshalls of CA, LLC*, No. 20-CV-07641-WHO, 2021 WL 1700204, at *6 (N.D. Cal. Apr. 29, 2021) (enforcing the class action waiver while ordering the arbitrator to determine all other issues of enforceability).

> final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to [the] interpretation or application of this Agreement, including the enforceability, revocability or validity of the Agreement or any portion of the Agreement.

Versions Two and Three of the Agreement state:

> Disputes covered by this Agreement include, without limitation, disputes arising out of or relating to [the] interpretation or application of this Agreement, including the enforceability, revocability or validity of the Agreement or any portion of the Agreement.

Because these terms clearly and unmistakably manifest the Parties' intent to delegate certain issues to the arbitrator, the Agreement's delegation clause is enforceable. The Court should decide questions of contract formation and enforceability of the class action waiver and defer to the arbitrator questions related to the interpretation and enforceability of the Agreement. *See, e.g., Louis v. Healthsource Glob. Staffing, Inc.,* No. 22-CV-02436-JD, 2022 WL 4960666, at *2 (N.D. Cal. Oct. 3, 2022) (Donato, J.) (enforcing delegation clause); *Williams v. Eaze Sols., Inc.*, 417 F. Supp. 3d 1233, 1241 (N.D. Cal. 2019) (Donato, J.) (enforcing delegation clause).

B. The Agreement Is Enforceable As to All Plaintiffs.

Since Twitter has shown that a valid agreement to arbitrate exists and applies to the claims at issue, Plaintiff bears the burden of proving that the agreement is not valid or enforceable. *Lang v. Skytap, Inc.*, 347 F.Supp.3d 420, 426 (N.D. Cal. 2018); *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, 55 Cal. 4th 223, 226 (2012). An arbitration agreement can be invalidated only if there is a showing that the agreement is both procedurally and substantively unconscionable. *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 783 (9th Cir. 2002); *see also Armendariz v. Foundation Health Psychare Services, Inc.,* 24 Cal. 4th 83, 114 (2000). "These two elements, however, need not both be present in the same degree." *Ferguson*, 298 F.3d at 783. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id*. (quoting *Armendariz*, 24 Cal. 4th at 114.) As explained above, these issues are delegated to the arbitrator. However, to the extent the Court chooses to address them, the Court should find that the Agreement is enforceable.

1. The Agreement Is Not Procedurally Unconscionable.

Procedural unconscionability refers to "oppression" or "surprise" due to unequal bargaining power that results in no real negotiation and an absence of meaningful choice. *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal.App.4th 1199, 1213 (1998). The procedural element to unconscionability may arise in connection with adhesion contracts, but the finding of an adhesion contract does not "per se" render an arbitration agreement unenforceable. *See*, *e.g.*, *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1245, 1251 (2016) (enforcing arbitration agreement where acceptance was a condition of employment). Further, the U.S. Supreme Court has recognized that "there often will be unequal bargaining power between employers and employees." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). However, "[m]ere inequality in bargaining power" does not render an employee's arbitration agreement unenforceable. *Id*. Further, the "freedom to choose whether or not to enter a contract of adhesion is a factor weighing against a finding of procedural unconscionability." *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal.App.3d 758, 769-771 (1989); *see also Circuit City Stores v. Ahmed,* 283 F.3d 1198, 1199 (9th Cir. 2002) (finding no procedural unconscionability, in part, because the plaintiff had an opportunity to opt out of arbitration).

Here, the Agreement is not procedurally unconscionable. The Agreement is a standalone document entitled "Dispute Resolution Agreement." Versions One and Two of the Agreement have a disclaimer, in bold type, at the top of the first page advising applicants that the Agreement "is a contract and covers important issues relating to your rights" and advising them of their right to "seek assistance from independent advisors" regarding the Agreement. *See* Callaghan Decl., Exs. A-E. The Agreement uses plain language to explain the arbitration process and the rights an applicant is waiving by entering into the Agreement. All Versions of the Agreement expressly state that "[a]rbitration is not a mandatory condition of Employee's employment at the Company" and advises employees of their right to opt out of the Agreement. *Id.* at § 8. There is no evidence of oppression or surprise and, accordingly, Plaintiffs cannot demonstrate that the Agreement is procedurally unconscionable.

2. The Agreement Is Not Substantively Unconscionable.

Substantive unconscionability "focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience." *Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322, 1330 (1999). The California Supreme Court in *Armendariz* set forth criteria for assessing whether an agreement may be substantively unconscionable. An employment arbitration agreement must provide for the following: (1) a neutral arbitrator, (2) adequate discovery, (3) a written award, (4) the availability of all the types of relief that would otherwise be available in court, (5) payment by the employer of any arbitration fees beyond what the employee would have to pay in court, and (6) include a "modicum of bilaterality." *Armendariz*, 24 Cal. 4th at 102-14, 117-18. Here, the Agreement satisfies each of these criteria.

First, the Agreement provides for the selection of a neutral arbitrator. Version One of the Agreement states that "[t]he Arbitrator shall be selected by mutual agreement of the Company and the Employee" and "[i]f for any reason the parties cannot agree to an Arbitrator, either party may apply to a court of competent jurisdiction with authority over the location where the arbitration will be conducted for appointment of a neutral Arbitrator." Callaghan Decl., Exs. A-B § 3. Versions Two and Three state that "[t]he Arbitrator shall be selected by mutual agreement of the Company and the Employee," and that if the parties cannot agree on an arbitrator or at the request of either party, "the dispute shall be heard by a neutral arbitrator chosen according to the procedures found in then-current JAMS Employment Arbitration Rules and Procedures." *Id.*, Exs. C-E § 3. Second, Versions Two and Three of the Agreement provide for discovery sufficient to vindicate Plaintiffs' claims, stating: "[T]he parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator."[11] *Id.*, Ex. C-E § 5. Third, the Agreement specifically provides for a written, reasoned award. Version One provides, "The Arbitrator will issue a decision or award in writing, stating the

[11] Version One states: "[T]he parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator."

essential findings of fact and conclusions of law."[12] *Id.*, Ex. A-B, § 7. Fourth, nothing in the Agreements limits the legal rights, remedies, or defenses that would be available in court and provide for all types of relief that otherwise would be available in court. *Id.,* Ex. A-E § 7 ("The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Agreement").[13] Fifth, all Versions of the Agreement provide that Twitter will pay the arbitrator's fees where required by law. *Id.* § 6 ("in all cases where required by law, the Company will pay the Arbitrator's and arbitration fees"). Finally, the Agreements provide that all parties are mutually required to submit their claims to arbitration. *Id.* § 1 (All Versions of the Agreement state: "This Agreement applies to any dispute arising out of or related to Employee's employment with Twitter, Inc. . .") The Agreements are binding on both Plaintiffs and Twitter, thereby satisfying the final *Armendariz* requirement of a "modicum of bilaterality."

IV. CONCLUSION

Plaintiffs each signed an arbitration agreement that mutually binds them and Twitter to arbitrate any dispute arising from or related to their employment on an individual basis. The agreement encompasses the claims asserted in the FAC. As a result, the Court should compel arbitration of their individual claims, dismiss the class claims, and dismiss this action.

Dated: November 21, 2022

MORGAN, LEWIS & BOCKIUS LLP

By */s/ Eric Meckley*
Eric Meckley
Brian D. Berry
Ashlee Cherry
Attorneys for Defendant
TWITTER, INC.

[12] Versions Two and Three also include the language "Unless otherwise agreed by the parties in writing" and require the arbitrator to issue a written decision "within 30 days after the date of closing of the arbitration hearing or the completion of post-hearing briefing, whichever is later."
[13] Versions Two and Three include the additional language: "The Arbitrator shall apply substantive law as applicable to the claims,".

Exhibit 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EMMANUEL CORNET, et al.,

Plaintiffs,

v.

TWITTER, INC.,

Defendant.

Case No. 3:22-cv-06857-JD

ORDER RE ARBITRATION

Named plaintiffs Emmanuel Cornet, Justine De Caires, Grae Kindel, Alexis Camacho, and Jessica Pan sued defendant Twitter, Inc., on behalf of themselves and a putative class of other Twitter employees, alleging that recent layoffs by Twitter violated federal and state laws. Dkt. No. 1 (original complaint); Dkt. No. 40 (second amended complaint). Twitter asks for an order compelling the individual claims of these named plaintiffs to arbitration pursuant to the parties' arbitration agreements and the Federal Arbitration Act (FAA). Dkt. No. 18.[1] Plaintiffs filed an opposition. Dkt. No. 37. Arbitration is granted.

BACKGROUND

The salient facts are undisputed. Plaintiffs signed arbitration agreements as part of their employment contracts with Twitter, which date from September 2017 to April 2021. Dkt. No. 18-1, Ex. A (Kindel), Ex. B (Camacho), Ex. C (De Caires), Ex. D (Pan), Ex. E (Cornet). The

[1] After Twitter filed its motion, plaintiffs amended their complaint to add three named plaintiffs who say that they opted out of Twitter's arbitration agreement. Dkt. No. 40 ¶ 14-16. The claims of these three individuals are not at issue in this motion. For ease of reference, "plaintiffs" refers only to the five named plaintiffs who are the subject of Twitter's motion.

agreements state in bold that "[a]rbitration is not a mandatory condition of Employee's employment at [Twitter]," and provided plaintiffs with an opportunity to opt out. *Id.* at ECF pp. 25, 35, 44. Plaintiffs did not opt out. *See id.* at ECF p. 7 ¶ 8 (Callaghan declaration).

Twitter has identified three versions of the agreements, *see* Dkt. No. 18 at 3, but the relevant provisions are materially the same. The arbitration agreements all expressly state that they are governed by the FAA. *See* Dkt. No. 18-1 at ECF pp. 23, 33, 42. They cover disputes "arising out of or related to" plaintiffs' employment with Twitter, including the termination of their employment. *Id.* Each agreement states that it applies to "disputes arising out of or relating to [the] interpretation or application of this Agreement, including the enforceability, revocability or validity of the Agreement or any portion of the Agreement." *Id.* Each agreement also contains a class action waiver, the validity and enforceability of which can only be determined by a "court of competent jurisdiction and not by an arbitrator." *Id.* at ECF pp. 24-25, 34, 43. The waiver requires the parties "to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis." *Id.*

LEGAL STANDARDS

The arbitration demand is governed by the FAA. The Court has discussed the governing standards in several prior orders, which are incorporated here. *See Louis v. Healthsource Glob. Staffing, Inc.*, No. 22-cv-02436-JD, 2022 WL 4960666 (N.D. Cal. Oct. 3, 2022); *Williams v. Eaze Sols., Inc.*, 417 F. Supp. 3d 1233 (N.D. Cal. 2019). In pertinent part, the FAA's "overarching purpose . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Under Section 4 of the FAA, the Court's role "is limited to determining whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue." *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). If the party seeking to compel arbitration establishes both factors, the district court "must order the parties to proceed to arbitration only in accordance with the terms of their agreement." *Id.* "Any doubts about the scope of arbitrable issues should be decided in favor of arbitration." *Williams*, 417 F. Supp. 3d at 1239; *see also Louis*, 2022 WL 4960666, at *2.

Unless the parties provide otherwise, the validity and scope of an agreement to arbitrate are determined by the Court. *See Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013); *Alonso v. AuPairCare, Inc.*, No. 3:18-cv-00970-JD, 2018 WL 4027834, at *1 (N.D. Cal. Aug. 23, 2018). The validity inquiry usually involves a determination of whether the arbitration agreement is unenforceable because it is unconscionable. *See Concepcion*, 563 U.S. at 339.

Alternatively, parties may delegate "gateway" questions of arbitrability to an arbitrator. *See Alonso*, 2017 WL 4551484, at *1. A delegation clause is enforceable when it manifests a clear and unmistakable agreement to arbitrate arbitrability, and is not invalid as a matter of contract law. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). Challenges to the validity of a delegation clause may be directed to (1) "the validity of the delegation clause itself," or (2) "the validity of the agreement to arbitrate or to the contract as a whole." *McLellan v. Fitbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484, at *1 (N.D. Cal. Oct. 11, 2017) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). "[T]he Court retains authority to determine any validity challenges directly addressed to delegation." *Alonso*, 2018 WL 4027834, at *1 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010)). But "[i]f a party challenges the overall agreement to arbitrate, without specifically challenging the delegation clause, the questions of validity and enforceability will go to the arbitrator." *Id.* (citing *McLellan*, 2017 WL 4551484, at *1).

DISCUSSION

Plaintiffs' main objection is that the arbitration agreements are unconscionable. *See* Dkt. No. 37 at 5-6. They do not raise any contract formation issues. Twitter provided signed copies of the agreements, and they are all clear and straightforward. *See generally* Dkt. No. 18-1. Because each arbitration agreement has a delegation clause, plaintiffs must show that the clause is invalid or otherwise does not encompass their unconscionability claims in order to litigate in this forum.

They have not done so. Plaintiffs relegated this threshold issue to a footnote, and say only that the delegation clauses "are not clear and unmistakable" because they do not "actually state that questions of arbitrability are delegated to the arbitrator." Dkt. No. 37 at 5 n.3.

The point is not well taken. To start, the delegation clauses in all three versions of the agreement state quite clearly that disputes about the enforceability and validity of the arbitration agreement are "to be resolved only by an arbitrator through final and binding arbitration." Dkt. No. 18-1 at ECF pp. 23, 33, 42. This is just the kind of language which establishes that "the parties clearly and unmistakably agreed to arbitrate the question of arbitrability." *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (finding adequate a delegation clause that gave "arbitrators the authority to determine 'the validity or application of any of the provisions of' the arbitration clause"); *see also Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016) (upholding delegation clause that provided arbitrators with "the authority to decide issues relating to the 'enforceability, revocability, or validity of the'" arbitration agreements).

The second and third versions of the agreement, which are applicable to De Caires, Pan, and Cornet, provide even more support for delegation. In addition to the plain delegation language discussed above, these agreements expressly provide that the parties "agree to bring any claim in arbitration before Judicial Arbitration and Mediation Services ('JAMS'), pursuant to the then-current JAMS Rules." Dkt. No. 18-1 at ECF pp. 34, 43. "JAMS procedures for employment arbitration delegate gateway issues to the arbitrator," *Alonso*, 2018 WL 4027834, at *5, and so the second and third versions have two independent grounds on which to delegate the question of arbitrability to the arbitrator.

The only remaining issue here is the enforceability of the class action waiver, which the parties reserved for the Court. Plaintiffs challenge only the portion of the waiver that precludes them from bringing "representative actions under the Private Attorneys General Act of 2004 [PAGA]." Dkt. No. 37 at 2; *see also id.* at 11. The grounds for this objection are unclear because the operative complaint does not allege a PAGA claim. Dkt. No. 40. Plaintiffs made a passing reference to "their anticipated PAGA claims," Dkt. No. 37 at 13, but the Court can only address what is presently in the record, *see Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 541 (9th Cir. 2021) (rejecting "argument that courts should stretch to invalidate contracts based on hypothetical issues that are not actually presented in the parties' dispute"). At this time, the PAGA waiver has no bearing on going to arbitration.

CONCLUSION

The claims of plaintiffs Cornet, De Caires, Kindel, Camacho, and Pan are ordered to arbitration on an individual basis. The effect of this order on the putative class in the second amended complaint will be taken up later as warranted by developments in the case.

IT IS SO ORDERED.

Dated: January 13, 2023

JAMES DONATO
United States District Judge

Exhibit 3

DISPUTE RESOLUTION AGREEMENT

This Dispute Resolution Agreement is a contract and covers important issues relating to your rights. It is your responsibility to read it and understand it. You are free to seek assistance from independent advisors of your choice outside the Company or to refrain from doing so if that is your choice.

You can choose to opt out of this Agreement – you have 30 days to opt out.

1. How This Agreement Applies

This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. If the FAA is found not to apply, then this Agreement is enforceable under the laws of the state in which you ("Employee") are employed at the time you enter into this Agreement. This Agreement applies to any dispute arising out of or related to Employee's employment with Twitter, Inc. or one of its affiliates, successor, subsidiaries or parent companies ("Company") or termination of employment, and survives after the employment relationship terminates. It can only be revoked or modified by a writing, signed by both you and Twitter, Inc.'s Chief Executive Officer, which specifically states an intent to revoke or modify this Agreement. Nothing contained in this Agreement shall be construed to prevent or excuse Employee or the Company from using the Company's existing internal procedures for resolution of complaints.

Disputes covered by this Agreement include, without limitation, disputes arising out of or relating to interpretation or application of this Agreement, including the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Except as it otherwise provides or required by law, this Agreement also applies, without limitation, to disputes regarding the employment relationship, terms and conditions of employment, trade secrets, unfair competition, compensation, breaks and rest periods, termination, discrimination, harassment, or retaliation, and claims arising under the Uniform Trade Secrets Act, Title VII of the Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, all other state statutory and common law claims, and any other employment-related claim.

Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all covered disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. **By entering into this Agreement, the parties are waiving a trial by jury.**

2. Limitations On How This Agreement Applies

This Agreement does not apply to claims for workers compensation, state disability insurance and unemployment insurance benefits.

Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include, without limitation, claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov) the U.S. Department of Labor (www.dol.gov) the National Labor Relations Board (www.nlrb.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp). Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

Disputes that may not be subject to predispute arbitration agreement as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203) are excluded from the coverage of this Agreement.

3. Selecting The Arbitrator

The Arbitrator shall be selected by mutual agreement of the Company and the Employee. Unless the Employee and Company mutually agree otherwise, the Arbitrator shall be an attorney licensed to practice in the state in which the arbitration proceeding will be conducted or a retired federal or state judicial officer who presided in the state where the arbitration will be conducted. If, however, the parties fail to agree on an arbitrator within 30 days after the initiation of arbitration, or at the request of either party, the dispute shall be heard by a neutral arbitrator chosen according to the procedures found in the then-current JAMS Employment Arbitration Rules and Procedures ("JAMS Rules"). The JAMS Rules may be accessed at: https://www.jamsadr.com/rules-employment-arbitration/. Alternatively, an Employee may obtain a copy of the JAMS Rules from Human Resources. The location of the arbitration proceeding shall be no more than 45 miles from the place where the Employee reported to work for the Company, unless each party to the arbitration agrees in writing otherwise.

4. Starting The Arbitration

All claims in arbitration are subject to the same statutes of limitation that would apply in court. The party bringing the claim must demand arbitration in writing and deliver the written demand by hand or first class mail to the other party within the applicable statute of limitations period. The demand for arbitration shall include identification of the parties, a statement of the legal and factual basis of the claim(s), and a specification of the remedy sought. Any demand for arbitration made to the Company shall be provided to the attention of the Company's Legal Department, Twitter, Inc., 1355 Market Street, Suite 900, San Francisco, CA 94103. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

5. How Arbitration Proceedings Are Conducted

Employee and the Company agree to bring any claim in arbitration before Judicial Arbitration and Mediation Services ("JAMS"), pursuant to the then-current JAMS Rules. In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. Discovery and conduct of the arbitration hearing shall be governed by the JAMS Rules applicable to discovery and arbitration hearing procedures.

You and the Company agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. Employee and the Company agree that any arbitration will be limited to the claims between Employee and the Company individually. Employee acknowledges and agrees that Employee and the Company are each waiving the right to participate as a plaintiff or class member in any purported class action, collective action or representative action proceeding ("Class Action Waiver"). This Class Action Waiver shall not apply to California Private Attorney General Act claims brought against the Company to the extent a Class Action Waiver is not legally enforceable as to those claims. Notwithstanding any other provision of this Agreement or the JAMS Rules, disputes regarding the scope, applicability, enforceability or validity of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator. In any case in which: (1) the claim is filed as a class, collective, or representative action and (2) there is a final judicial determination that the Class Action Waiver is unenforceable as to any claims, the class, collective, and/or representative action on such claims must be litigated in a civil court of competent jurisdiction, but the Class Action Waiver shall be enforced in arbitration on an individual basis as to all other claims to the fullest extent possible and the claims to be litigated in court shall be stayed pending the completion of the arbitration on the arbitrable claims.

6. Paying For The Arbitration

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. However, in all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned between the parties in accordance with said applicable law, and any disputes in that regard will be resolved by the Arbitrator.

7. The Arbitration Hearing And Award

The parties will arbitrate their dispute before the Arbitrator, who shall confer with the parties regarding the conduct of the hearing and resolve any disputes the parties may have in that regard. The Arbitrator shall apply substantive law as applicable to the claims, and may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator; no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Agreement. Unless otherwise agreed by the parties in writing, the Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law, within 30 days after the date of closing of the arbitration hearing or the completion of post-hearing briefing, whichever is later. Except as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration.

8. An Employee's Right To Opt Out Of Arbitration

Arbitration is not a mandatory condition of Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement. The Employee must submit a signed and dated statement on a "Dispute Resolution Agreement Opt Out Form" ("Form") that can be obtained from the Company's Human Resources Department at hrlegaldocs@twitter.com. In order to be effective, the signed and dated Form must be returned to the Human Resources Department within 30 days of the Employee's receipt of this Agreement. An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. Should an Employee not opt out of this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company. An Employee has the right to consult with counsel of the Employee's choice concerning this Agreement.

9. Non-Retaliation

An employee will not be subject to retaliation if he or she exercises his or her right to assert claims under this Agreement. If any Employee believes that he or she has been retaliated against by anyone at the Company, the Employee should immediately report this to the Human Resources Department.

10. Enforcement Of This Agreement

This Agreement is the full and complete agreement relating to the formal resolution of covered disputes. Except as stated in paragraph 5, above, in the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is deemed to be unenforceable, the Company and Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration. Nothing in this Agreement modifies the at-will nature of Employee's employment with the Company.

AGREED:

Leslie Berland, Head of People
TWITTER, INC.

By signing below, I acknowledge and agree to the terms of this Dispute Resolution Agreement, and confirm I am aware of my right to opt out per the terms of this Agreement:

EMPLOYEE NAME PRINTED Jessica Pan

EMPLOYEE SIGNATURE Jessica Pan
Jessica Pan (Nov 18, 2019)

Date: Nov 18, 2019

Exhibit 4

Insight from the President: JAMS Policy Regarding Mass Arbitration Filings

JAMS' core value is neutrality

KIMBERLY TAYLOR, ESQ.
JAMS President

The question whether class action arbitration waiver agreements are enforceable was decided by the United States Supreme Court in its 2018 opinion in *Epic Systems Corp. v. Lewis*, 823 F.3d 1147, where Justice Gorsuch, writing for the majority, stated that the Court has determined that the Federal Arbitration Act "establishes 'liberal federal policy favoring arbitration agreements,'… [and] arbitration agreements like those before us must be enforced as written."

Following that decision, and in the face of an arbitration clause that bars class or collective actions, attorneys representing employees or consumers have responded in some instances by filing dozens, hundreds or even thousands of individual arbitration demands against a single company. These filings have prompted questions from Claimants' and Respondents' counsel about how ADR providers will administer the matters, what fees apply and whether providers will impose specialized processes that may run counter to the specific terms of the parties' contract. Claimants whose contract requires them to pay a portion of the initial filing fee may request a discount or waiver of the filing fees, and Respondent companies that may be required to pay the remainder or all of the filing fees balk at what may be a costly and prohibitive sum. Respondents may also question whether every individual claim is legitimate before it posts filing fees for the matter, but in some jurisdictions face penalties if they don't pay the arbitration filing fees within a specified time period.

JAMS understands the complexities of the situation. However, we have a fundamental responsibility and commitment to neutrality and high ethical and professional standards. Our role as the administrator of the parties' arbitration proceedings prohibits us from modifying or changing the arbitration agreement absent express agreement of the parties. If the parties' agreement prohibits class actions and consolidations, we must treat each case individually. Each matter is commenced and managed separately because that is what the pre-dispute contract requires. Every arbitration receives its own process and its own arbitrator, and the resources needed to manage these individual arbitrations are similar to or greater than any individual arbitration.

JAMS has developed internal protocols to make the commencement process as efficient as possible, including maximizing the use of technology and creating a dedicated team to oversee the commencement of the arbitration and appointment of the arbitrator. We aim to fulfill the goal of arbitration—an efficient, fair and neutral proceeding that leads to a final arbitration award that will be upheld in court. JAMS will not reduce fees for either side to avoid even an appearance of impartiality or bias. Every individual arbitration receives individual treatment and an individual award to ensure the parties receive an impartial, neutral and fair process.

We encourage the parties to collaborate at the outset of a mass filing (which JAMS defines as any group of 25 or more filings from the same law firm or lawyer against the same company at the same time). Strategies that have proven effective include sharing information about the validity of each individual's status (employee, customer, etc.); filing demands in batches; and agreeing on "test" cases, arbitrator selection, manner of hearing (in-person, virtual or hybrid), timelines for commencement and hearings, etc. JAMS can work with the parties to implement any processes or procedures that have been agreed upon prior to or even after an arbitration has been filed. However, in the absence of an agreement amongst the parties, the arbitration agreement controls.

To reiterate, JAMS' core value is neutrality. We take each individual arbitration as it is filed, according to the terms of the contract. We take that position to maintain our neutrality and because we do not believe we have the power, as the administering body, to change the parties' agreement unilaterally.

EXPLORE MORE ON THESE TOPICS

Exhibit 5

JAMS
Before Arbitrator Michael J. Loeb

JESSICA PAN, Claimant, v. TWITTER, INC. and X CORP. Respondents	JAMS Ref. No.: 1100115270

SCHEDULING ORDER

Claimant Jessica Pan and Respondents Twitter, Inc. and X Corp. are hereby obligated to comply with the following scheduling order:

A. Final Arbitration Hearing

Date:	**April 15-17, 2024**
Time:	**9:00 a.m. – 3:00 p.m. PST**
Remote or Location:	**Remote (unless parties agree to in-person in San Francisco)**

B. Discovery

Initial disclosures shall be made by **July 17, 2023.**

Discovery shall commence on **June 7, 2023**, and end **December 1, 2023**. All discovery responses and depositions shall be completed by the discovery deadline. Each side shall be entitled to a total of twenty (20) interrogatories and twenty-five (25) document requests. Each side shall be entitled to take up to five (5) depositions. Each deposition is limited to a maximum of four (4) hours. Further discovery will only be allowed on a showing of good cause.

Without waiving any potential objections to admissibility at the Final Arbitration

Hearing or other proceeding, in an effort to promote overall efficiency, the parties agree that any evidence produced in another court case and/or arbitration between Respondents and Plaintiffs/Claimants represented by Lichten & Liss-Riordan, P.C. (including deposition or hearing testimony) may be used in this arbitration without having to be requested/produced again in discovery. Similarly, the parties agree that any evidence produced in this arbitration (including deposition and hearing testimony) may be used in another court case and/or arbitration between Respondents and Plaintiffs/Claimants represented by Lichten & Liss-Riordan, P.C. without having to be requested/produced again in the other matter, subject to and without waiving any potential objections to admissibility based upon the applicable evidentiary rules in the venue where such evidence is sought to be used.

In light of this agreement outlined in the above paragraph, the parties shall reasonably and in good faith attempt to avoid requesting discovery that is unnecessarily duplicative of discovery conducted in another arbitration and/or court case. In order to depose a witness again who has already been deposed in another arbitration and/or court case in which Plaintiffs/Claimants are represented by Lichten & Liss-Riordan, P.C., the party seeking the deposition shall identify good cause to depose that witness again.

If a potential discovery issue arises, the parties shall meet and confer in good faith in an attempt to resolve the issue. If the issue cannot be resolved, the parties shall submit a joint letter (of no more than 10 pages) to the Arbitrator outlining their dispute.

C. Witnesses

Deadline to exchange final witness lists (excluding witnesses used solely for impeachment): **February 1, 2024.**

If a witness has previously testified live at the trial or hearing in another court case and/or arbitration between Respondents and Plaintiffs/Claimants represented by Lichten & Liss-Riordan, P.C., the parties may agree to use that witness' recorded testimony in lieu of live testimony. A party seeking live testimony of a witness who has already testified live in a deposition and/or hearing in a previous matter in which Plaintiffs/Claimants are represented by Lichten & Liss-Riordan, P.C., shall confer with the other party to determine whether agreement may be reached regarding whether that witness will testify live again. If agreement cannot be reached, the parties may bring the matter to the Arbitrator for resolution. The Arbitrator prefers live testimony.

D. Advance Exchange of Identification of Exhibits

March 15, 2024, shall be the deadline to exchange final exhibits lists of all exhibits that may be used at the Final Arbitration Hearing (excluding exhibits used solely for impeachment). Each party will provide the other party with one (1) copy of all exhibits identified on the respective party's final exhibit list. The parties are to confer prior to **March 29, 2024**, as to the exhibits, confirm those exhibits to which the parties stipulate as to admissibility at the Final Hearing, eliminate duplicates, and to the extent possible arrive at a joint exhibit list. Objections to exhibits shall be filed no later than **April 5, 2024**. The parties shall submit to the Arbitrator in advance of the Final Pre-Trial Case Management Conference one binder containing joint exhibits, one binder containing Claimant's exhibits (to which Respondents have objected), and one binder containing Respondents' exhibits (to which Claimant has objected).

E. Additional Case Management Conference Calls

The Arbitrator shall schedule case management calls approximately every 60 days. The next case management call shall be held on **August 7, 2023,** at 9:00 a.m. PDT. The Parties shall submit a joint letter focusing on the status of discovery by August 4, 2023.

A Zoom Final Pre-Trial Case Management Conference shall be held on **April 8, 2024.**

F. Dispositive Motions or Motions to Streamline Issues for Final Hearing

Pursuant to JAMS Employment Rule 18, "The Request [to file a Motion for Summary Disposition of a particular claim or issue] may be granted only if the Arbitrator determines that the requesting Party has shown that the proposed motion is likely to succeed and dispose of or narrow the issues in the case."

If a party chooses to file a dispositive motion, it shall file a brief of no more than ten (10) pages setting forth why a dispositive motion may be warranted. The other party may respond if it chooses with a brief of no more than ten (10) pages. The Arbitrator shall schedule a conference call to determine whether to allow a dispositive motion to be filed.

If the Arbitrator agrees to consider the motion, it shall be submitted to the Arbitrator no later than **December 15, 2023**. Responses to such motions shall be filed no later than **January 5, 2024,** and replies shall be filed no later than **January 12, 2024.** A hearing shall be scheduled to allow the Arbitrator time to render a decision before **February 15, 2024.**

G. Motions in Limine

March 29, 2024, is the deadline to file any motions in limine. If the opposing party wishes to file a response, said response shall be filed within five (5) business days of receipt of the motion(s) in limine. The motions in limine shall be heard at the Final Pre-trial Case Management Conference.

H. Stipulations of Uncontested Facts (If Any)

The parties shall stipulate to uncontested facts, if any, by **March 29, 2024.**

I. **Court Report**

The parties jointly request a court reporter for the Final Arbitration Hearing and agree to share the cost of the court reporter. The transcript of the hearing shall be shared with the Arbitrator.

J. Pre-Hearing Brief, Post-Hearing Brief and Form of Award

Pre-Hearing briefs (of no more than 10 pages) shall be filed no later than **April 5, 2024.**

At the conclusion of the Final Hearing, each party shall submit a Post-Hearing Brief as to both evidence and legal issues. The parties shall simultaneously file their respective Post-Hearing Briefs within 30 days of the conclusion of the Final Hearing or as may be agreed to or determined by the Arbitrator. Parties may not file responsive briefs unless agreed to or allowed by the Arbitrator. The Arbitrator shall schedule a closing argument after the filing of Post-Hearing Briefs.

A reasoned opinion shall be issued by the Arbitrator.

Should attorneys' fees be awarded by the Arbitrator, any petition for fees shall be submitted following the issuance of the Arbitrator's opinion, at the direction of the

Arbitrator.

ORDERED this 6th day of June, 2023.

Michael J. Loeb
Arbitrator

cc: Counsel of Record