No. 20-55564

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANTIAGO LIM,

Plaintiff-Appellee,

v.

TFORCE LOGISTICS, LLC and TFORCE FINAL MILE WEST, LLC,

Defendants-Appellants

On Appeal from the United States District Court
for the Central District of California, No. 2:19-cv-04390-JAK (AGRx)
Hon. John A. Kronstadt

APPELLANTS' OPENING BRIEF

Paul Marron, SBN 128245
Steven C. Rice, SBN 109659
MARRON LAWYERS, APC
5000 E. Spring St., Suite 580
Long Beach, California 90815
Telephone number: (562) 432-7422
Counsel for Defendants-Appellants

CORPORATE DISCLOSURE STATEMENT

FRAP 26.1

The undersigned, counsel of record for Defendants-Appellants TFORCE LOGISTICS, LLC and TFORCE FINAL MILE WEST, LLC certify that the following listed entities may have a pecuniary interest in the outcome of this case.

1. TForce Final Mile West, LLC
2. TForce Logistics, LLC
3. Dynamex Operations, West, Inc.
4. TFI International, Inc.
5. TForce Logistics, Inc.
6. TForce Logistics West, LLC

Dated: October 14, 2020 MARRON LAWYERS, APC

By:/s/Steven C. Rice
Paul Marron
Steven C. Rice
Attorneys for Defendants-Appellants
TForce Logistics, LLC and TForce
Final Mile West, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER SOURCES

JURISDICTIONAL STATEMENT

Defendants-appellants TForce Logistics, LLC ("TF Logistics") and TForce Final Mile West, LLC ("TFFMW") removed this lawsuit, filed by Plaintiff-Appellee Santiago Lim ("Lim"), from Los Angeles County Superior Court to the U.S. District Court for the Central District of California (Kronstadt, J.), pursuant to 28 U.S.C. §§1332(d), 1441, 1446, and 1453. Excerpts of Record ("ER") 578-675.

This Court has jurisdiction pursuant to a timely filing of this appeal (filed May 27, 2020) (ER 135-159) from an order (filed April 27, 2020) denying arbitration under the Federal Arbitration Act ("FAA," 9 U.S.C. §1, *et seq*.). ER 1-20. The order that is the subject of this appeal is directly and immediately appealable under the Federal Arbitration Act ("FAA"). 9 U.S.C. §4.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issue presented in this appeal is: Did the District Court err under the Federal Arbitration Act ("FAA"), by refusing to order the arbitration of all "arbitrability issues" pursuant to the clear and unmistakable "delegation clause" in the Arbitration Agreement in the Independent Contractor Agreement for Transportation Services (the "Contract") that Respondent Lim executed on May 18, 2011, on grounds that venue and fee-splitting provisions and a "prevailing party" attorneys' fees clause in the parties' Contract rendered the *delegation clause* "unconscionable"? Sub-issues include:

A. Did Respondent meet his burden of establishing a viable unconscionability defense to the clear and unmistakable "delegation clause" under the FAA?

   1. Did the District Court err by ruling that the Arbitration Fee Split/Waiver Provision of the Arbitration Agreement was unenforceable under California law as applied to the Delegation Clause, notwithstanding that Appellants had agreed to pay all arbitration fees in light of Respondents' current financial condition?
   2. Did the District Court err by ruling that the Venue Provision of the Arbitration Agreement was unenforceable under California law as applied to the Delegation Clause?

3. Did the District Court err by ruling that the term Attorney Fees Provision in the parties' Contract was unenforceable under California law as applied to the Delegation Clause?

B. Did the District Court err by ruling that any of these terms (all of which had been waived by Appellants) could not be "severed" from the agreement – and the remainder of the agreement enforced – as required by the "Severance Clause" in the parties' Contract, by erroneously finding that these terms had caused the *Delegation Clause* to be "permeated with unconscionability," under the authority of *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000)?

STATEMENT OF THE CASE

Respondent Santiago Lim (hereafter "Lim" or "Respondent") executed an Independent Contractor Agreement for Transportation Services ("Contract") on May 18, 2011.[1] Paragraph 19 ("Arbitration Agreement") of the Contract clearly states the parties' agreement that all disputes must be submitted to binding arbitration before the American Arbitration Association ("AAA") under its Commercial Arbitration Rules. The Arbitration Agreement requires individual arbitration.[2] Each page of the Contract, including each page on which the Arbitration Agreement is set forth, was separately initialed by Lim. The parties' operated for years pursuant to the Contract.

Despite Lim's contractual duty to arbitrate his claims individually, on February 21, 2019, Lim filed a lawsuit in California Superior Court in Los Angeles against Appellants TForce Logistics, LLC ("TF Logistics") and TForce Final Mile

[1] The Contract was between Lim and Dynamex Operations West, Inc. ("Dynamex Ops. West"). Since before the filing of this action, Dynamex Ops. West's operations have been conducted by Defendant TForce File Mile West, LLC ("TFFMW"). Respondent's complaint and briefing papers acknowledge both that defendant TFFMW is a successor entity to Dynamex, and that TFFMW, along with Lim, is a party to both the Arbitration Agreement and its Delegation Clause. ER 586 [Complaint, ¶5] ("TForce" entities were formerly known as "Dynamex."]; see also ER 498 (Defendants provided Contract to Lim and "instructed him" in regard to it); ER 503 ("Defendants drafted [the Contract.]") Therefore, this issue is not in dispute, and Dynamex Ops. West is, therefore, included in the terms "parties," "Appellants," "TForce," and "TFFMW" throughout this brief.

[2] The agreement expressly does *not* allow for "class" arbitration. ER 535-536.

West, LLC ("TFFMW"), claiming that he and "similarly situated" persons were misclassified and should have been deemed *de facto* employees of Appellants. He has refused to submit his claims to individual arbitration as he had agreed in his Contract. His action was properly and timely removed to the U.S. District Court for the Central District of California (Kronstadt, J.), pursuant to 28 U.S.C. §§1332(d), 1441, 1446, and 1453, on May 21, 2019. ER 657-675. Appellants thereafter timely moved for enforcement of the terms of the arbitration agreement signed by Lim. ER 553-577. Significantly, the Arbitration Agreement contained a clause delegating all disputes relating to the arbitrability of disputes *to the arbitrator*. This clause within the arbitration agreement ("Delegation Clause") provides that "… any disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties*, shall be fully resolved by arbitration." ER 535 at ¶19 (emphasis added.)

The District Court properly found that the parties had agreed to the Arbitration Agreement, and the Court found that the claims asserted by Lim[3] fell within its scope. ER 14-15. The District Court properly held that the Arbitration Agreement was subject to the enforcement provisions of the Federal Arbitration Act. ER 10-11.

The District Court then considered whether the Delegation Clause was "clear

[3] Lim asserts "misclassification"-based claims for benefits and payments under provisions of California's Labor Code and other provisions of law.

and unmistakable" as required by the FAA, and properly determined that the Delegation Clause "meets this standard." The Delegation Clause provided: "All disputes and claims arising under, out of, or relating to this Agreement … including the arbitrability of disputes between the parties, shall be fully resolved by arbitration…." ER 17. Therefore, the Delegation Clause was enforceable in the absence of generally applicable contract defenses specifically related to the Delegation Clause. ER 12. Put differently, unless a generally recognized (and otherwise unresolvable) defense was found to apply to the agreed process by which *the arbitrator* would resolve the enforceability of the Arbitration Clause "as a whole," all such issues must be referred to the arbitrator for final resolution.[4] These portions of the District Court's ruling are *not* challenged by this appeal.

However, the District Court next considered the defenses raised by Lim to the enforceability of the Delegation Clause. These defenses were characterized by Lim as establishing that enforcing the Delegation Clause would be "unconscionable" under California contract law, which requires a finding of both procedural and

[4] A delegation clause is *itself* viewed as a separately enforceable agreement. *Rent-A-Center, West, Inc. v. Jackson* ("*Rent-A-Center*"), 561 U.S. 63, 70-74 (2010); *Brennan v. Opus Bank* ("*Brennan*"), 796 F.3d 1125, 1132-1133 (9th Cir. 2015). Therefore, the court may, in the first instance, *only* consider whether *the delegation clause* is enforceable. *Brennan*, *supra*, 796 F.3d at 1133. Of course, if the arbitrator determined that the Arbitration Agreement was unenforceable, then the resolution of the merits of Lim's claims would be properly addressed to the court. See

substantive unconscionability. *Pinnacle Market Dev. (US), LLC* ("*Pinnacle*"), 55 Cal.4th 223, 247 (2012).

On the first of these issues, the District Court found that the Contract was on a pre-printed, "take-it-or-leave-it" form, which provided sufficient "procedural unconscionability" for the court to next consider whether the provisions were *substantively* unconscionable under California law. However, the Court also noted that Lim had no "language barrier" (distinguishing it from *Saravia v. Dynamex*, 310 F.R.D. 412, 420, 424 (2015) ["… this order determined that the arbitration provisions in Saravia's agreements with Dynamex West were unenforceable, that finding was based on facts that may have been unique to Saravia, such as Dynamex's knowledge that he did not speak English and the terseness of the presentation of the agreements."]). Significantly, the Court also noted that Lim had worked with contracts in his prior employment as a state-licensed insurance producer. ER 15-16.[5]

[5] Respondent Lim was licensed as #0600181 by the California Department of Insurance through December 31, 2015. The significance of this licensure was summarized to the District Court as follows: "California requires 20 hours of study (including Contract Law), plus an exam, before awarding the licenses Lim held. 10 Cal. Code Regs. §§ 2187-2187.31" ER 434; see also, ER 386-387. The District Court held "Although not as severe as the procedural unconscionability in *Saravia*, where a language barrier presented substantial issues, it is still significant." ER 15-16. **Significantly, a few months prior to the *Saravia* ruling, the California Court of Appeal fully enforced this same delegation clause, sending the parties to arbitration and reversing the trial court. *Kohsuwan v. Dynamex, Inc.*, 2015 WL 3457280, at *1–4 (Cal.App. 4 Dist., 2015)**, 2015 Wage & Hour Cas. 2 (BNA) 183,973 (*not officially published*; see ER 24).

As to substantive unconscionability, Lim made the following assertions:

1) The Arbitration Agreement provided that "**the arbitration fees shall be split between the parties, *unless CONTRACTOR shows that the arbitration fees will impose a substantial financial hardship on CONTRACTOR as determined by the Arbitrator*, in which event [TForce] will pay the arbitration Lim fees**." ["Fee Split/Waiver Provision"]. Lim argued that this provision would unconscionably subject him to half "the substantial fees and costs" of obtaining resolution of the issue of arbitrability. ER 507-509 Lim offered evidence (only) of his *current financial condition* (ER 485-486 at ¶¶24-26) to show that he could not pay these fees without substantial hardship.[6]

2) The Contract included an agreement that arbitration proceedings "shall be filed and/or maintained in Dallas, Texas…." ["Venue Provision"] (ER 505-507)[7] Lim offered evidence (only) of his *current financial condition*

[6] Appellants had, and has, *agreed* that Lim would not be required to pay *any* arbitration fees for resolving arbitrability, *and also for resolving the case on the merits*. Even before the District Court's hearing on the Motion to Compel Arbitration, Appellants had filed for arbitration (in Los Angeles per Lim's preference, and agreed to pay all fees. The initial filing fee has *already been paid* by Appellants. ER 404, 435.

[7] Lim acknowledged that California's statutory definition of "unconscionability" (Civ. Code §1670.5) *required* a showing that the provision was unconscionable "at the time it was entered." ER 512, lines 13-16. However, Lim offered *only* evidence of his *current* financial condition, and pointed to case law holding that a party must be able to vindicate his rights in arbitration. ER 505-508, ER 499, lines 21-28, ER

(ER 485-486 at ¶¶24-26), to show that his appearance in Dallas, Texas would be "unduly oppressive."

3) Lim also argued that a term in the parties' Contract "as a whole" ("the Independent Contractor Operating Agreement," ER 529-523) provides that "if any action is necessary to enforce the terms" of the ("Contract") the "prevailing party shall be entitled to recover its attorneys' fees, costs and disbursements" [the "Attorney Fees Provision"]. ER 499. Lim argued that this clause rendered the Delegation Clause unconscionable, notwithstanding that it is not applicable to the determination of arbitrability, but only as to the ultimate determination on the merits.[8]

500, lines 1-5. While, *under certain circumstances*, a party's current financial condition or other factors may give rise to such a defense to enforcement of contract terms, no such circumstances exist when the conditions that might prevent "vindication" of the claims will not affect a claimant and/or have been waived. See *infra*, Section IV.B.2, pp. 31-35.

[8] Lim also made arguments, aimed at attacking the enforceability of the Arbitration Agreement *as a whole* and which Lim did not attempt to apply to the Delegation Clause (argued in the event that the Court ruled that the Delegation Clause was not enforceable); specifically, a one-year statute of limitations provision and a choice of law provision. ER 511-512. Since the arguments were not related to enforceability of the arbitration clause they will not be reargued here. *Rent-A-Center*, 561 U.S. at 70-73. Under the FAA, any issues relating to these provisions must be resolved by the arbitrator, not the courts, unless meritorious defenses are directed specifically against the Delegation Clause – *not the "arbitration agreement as a whole." Rent-A-Center*, 561 U.S. at 71-74; see also *Mohamed v. Uber Techs., Inc.* 848 F.3d 1201, 2010 (9th Cir. 2016).

On April 27, 2020, the District Court denied the Appellants' motion for an order that all issues and determinations, including arbitrability, be resolved through arbitration, as Lim had agreed to do. ER 1-14. Specifically, the District Court's order found that each of these three provisions rendered the Delegation Clause "substantively unconscionable" under California law (ER 17-18), thus excusing enforcement as agreed by the parties. This was in error, as shown below.[9]

Next, the District Court considered the Appellants' request that the provisions be "severed" from the Delegation Clause – and the remainder of the clause enforced. Severance would allow other issues to be ruled on by the arbitrator including whether the Arbitration Clause "as a whole" was enforceable, thus permitting the main purpose of the Delegation Clause to be vindicated while removing the terms that the court had found to be unfair. This issue was directly addressed in the Contract. Paragraph 29 ["SEVERABILITY"] of the parties' contract expressly provides, "**If any part of the Agreement is held unenforceable, the rest of the Agreement will continue in effect.**" ER 537.[10]

---

[9] See *infra*, at pp. 21-26. Significantly, this <u>*same*</u> Delegation Clause was unanimously found to be enforceable by the Court of Appeal for California's Fourth District in 2015. See *Kohsuwan v. Dynamex, Inc.*, 2015 WL 3457280; 2015 Wage & Hour Cas.2d (BNA) 183,973 (Cal. 4th Dist., as modified June 10, 2015) *3-4.

[10] See California Civil Code ("Civ. Code") §1670.5 ["[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable

The Court, however, also refused to enforce this term of the parties' Contract. The Court based its refusal to honor the agreement on a finding that, due to these three provisions, the Delegation Clause was "permeated with unconscionability" as described by in *Armendariz v. Foundation Health Psychcare Services, Inc.* ("*Armendariz*"), 99 Cal.Rptr.2d 745, 775, 24 Cal.4th 83, 124 (2000). ER 17-18. This ruling was also in error, as shown below.[11]

The Appellants then gave timely notice of this appeal on May 26, 2020. ER 135-159.[12]

result."]; Civ. Code §1599 ["[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."].

[11] See *infra*, at pp. 38-44; *Bermudez v. PrimeLending*, 2012 WL 12893080, at *14 (C.D. Cal. Aug. 14, 2012) [severing four provisions including a bilateral shifting of attorneys' fees and a unilateral exclusion from arbitration for a defendants' claims]; *Colvin v. NASDAQ OMX Group*, 2015 WL 6735292 (N.D.Cal. 2015), at *9 [severing multiple unconscionable provisions]; *Grabowski v. C.H. Robinson Co.*, 817 F.Supp.2d 1159, 1179 (S.D.Cal. 2011) [same].

[12] The District Court has not, as of the date of this filing, ruled on the Appellants' motion seeking an order *staying* the underlying case pending the resolution of the appeal. See ER 62-91. That motion has been fully briefed and was argued on July 20, 2020.

REVIEWABILITY AND STANDARD OF REVIEW

A. Reviewability

1. The denial of a motion or petition to compel arbitration under the Federal Arbitration Act ("FAA") is directly appealable. 9 U.S.C. §4.

2. The District Court has stayed proceedings pending the resolution of this appeal. ER 5-6.

B. Standards of Review

1. "We review the denial of a motion to compel arbitration *de novo*." *Cox v. Ocean View Hotel Corp.,* 533 F.3d 1114, 1119 (9th Cir. 2008).

2. "The interpretation and meaning of contract provisions" are reviewed *de novo*. *Milenbach v. Commissioner,* 318 F.3d 924, 930 (9th Cir. 2003); *Nguyen v. Barnes & Noble In*c., 763 F.3d 1171, 1175 (9th Cir. 2014).

3. Underlying factual findings are reviewed for clear error. *Balen v. Holland Am. Line Inc.,* 583 F.3d 647, 652 (9th Cir. 2009).

4. Factual findings made under an erroneous legal standard are accorded no deference and are reviewed *de novo*. *Inwood Labs., Inc. v. Ives Labs., Inc*., 456 U.S. 844, 855, fn. 15 (1982); *Star Industries, Inc. v. Bacardi & Co., Ltd.*, 412 F.3d 373, 382-83 (2d Cir. 2005); *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc*., 684 F.2d 1316, 1318 (9th Cir. 1982).

SUMMARY OF ARGUMENT

Enforcement of arbitration agreements is an important policy under both state and federal laws. Businesses rely on arbitration agreements to keep litigation costs down through efficient, final and less-formal resolution processes, thus allowing them to negotiate pricing and other contract terms with more certainty.[13] For this reason, arbitration agreements have become a routine part of most business contracts.

The Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA"), ensures that arbitration agreements are enforced, and treated in the same manner as other contracts. The FAA also treats a delegation clause, such as the one agreed by the parties here, as a separate, "severable" arbitration agreement – one that must be enforced unless defenses are raised and proved which are *specifically directed at the delegation clause, and not the arbitration agreement as a whole.*

Here, the District Court correctly acknowledged that the parties' Arbitration Agreement contained a "clear and unmistakable" Delegation Clause, enforceable under the FAA. ER 17. As shown herein, this Delegation Clause should have been

[13] See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ["Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."]; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ["Parties generally favor arbitration precisely because of the economics of dispute resolution."]; *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013) ["speedy resolution"].

enforced, and the District Court's refusal to do so was in error.

Respondent complained that three provisions rendered the Delegation Clause unenforceable: The Arbitration Fee Split/Waiver Clause, the Venue Clause, and the Attorney Fees/Costs Provision. However, as shown below, none of these terms were proven to be either "unconscionable," or otherwise unenforceable. In fact, any provisions which could conceivably have hindered Lim's access to arbitration had been waived. Appellants had already initiated arbitration in Los Angeles, paid all arbitration fees, and provided written assurance that they would continue to do so.[14]

Finally, the District Court then further erred in failing to sever any provisions which it found to be unenforceable. The parties' Contract expressly provided that its terms would be easily severable to preserve the enforceability of rest of the agreement. ER 537 at ¶29. The provisions targeted by Lim were easily severable without changing the "central purpose" of the agreement to delegate issues to arbitration. Moreover, there was no evidence offered to support a finding that the Delegation Clause was "permeated with unconscionability" *when the agreement was entered* (mandatory to avoid severance under the principles that founded the *Saravia*, *supra*, decision, on which the District Court relied heavily). See ER 17-18.[15]

---

[14] ER 544-546, ER 403-424, ER 435, lines 19-27. This was acknowledged in the District Court's Order. ER 18.

[15] While Lim argued that the Delegation Clause was unconscionable under California law, his showing was deficient *as a matter of law*. No evidence was offered that the Delegation Clause required Lim to travel to Dallas *to litigate the*

Under the FAA, all issues of arbitrability should have been ordered to be resolved through arbitration. None of the terms cited by the District Court rendered the *Delegation Clause* "unconscionable" or otherwise unenforceable, when analyzed for their impact on the Delegation Clause and its requirement that an arbitrator (rather than the court) determine the enforceability of the arbitration agreement.

Appellants respectfully ask this Court to reverse the portions of the District Court's Order which held that the above-referenced provisions were unenforceable as to their effect on the Delegation Clause. In addition, to the extent necessary to enforce the Delegation Clause, Appellants respectfully ask this Court to reverse those portions of the District Court's Order which refused to apply the Contract's Severability Clause to remove any unenforceable provisions, as required to enforce the Delegation Clause, and to order the parties to arbitrate all issues of arbitrability. Finally, this Court is respectfully requested to vacate all portions of the District Court's Order in which the Court purported to make rulings regarding arbitrability

---

issue of arbitrability, as opposed to having the matter heard remotely. In fact, the District Court in Los Angeles simultaneously made *its own ruling on arbitrability* based on Lim's declaration, without his personal presence. Further, despite acknowledging the requirements for statutory unconscionability Lim offered no evidence that *at the time he entered this agreement*, he was unable to pay airfare *or* arbitration fees. This was mandatory for a finding that severance was avoidable due to "permeation" of the agreement with "unconscionability." *Armendariz*, 24 Cal.4th 83, 121-122 (2000). In fact Lim only argued and offered evidence that he is *currently* unable to afford travel and unspecified fees (at the time of his declaration). ER 485-486 at ¶¶24-25]

(and other issues) which are required to be decided *de novo* through arbitration as agreed by the parties.

ARGUMENT

I. INTRODUCTION

This case involves a straight-forward application of well-established principles. Unless a party has proven that a defense exists, Contracts should be enforced according to their terms. Arbitration agreements are no exception. Agreements to send all issues regarding whether a dispute is "arbitrable" to an arbitrator are also no exception.

Here, Respondent Lim signed the underlying Contract. He also separately initialed each page, including the pages setting forth the parties' Arbitration Agreement. Lim knowingly accepted the benefits of the relationship created by the Contract to provide passenger transportation services for which his delivery business received direct compensation.

The parties' Contract required *all* disputes to be resolved through arbitration, rather than through a lawsuit, including any challenges to the "arbitrability of disputes." The scope of the agreement was very broad:

> All disputes and claims arising under, out of, or relating to this Agreement, including … and any disputes arising out of or relating to the relationship created by this Agreement or prior agreements between us, including any claims or disputes arising under any state or federal laws, statutes, or regulations, and any disputes as to the rights and

> obligations of the parties, *including the arbitrability of disputes between the parties*, shall be fully resolved by arbitration…. The parties specifically agree that no dispute may be joined with the dispute of another and agree that class actions under this arbitration provision are prohibited.
>
> ER 535-536 at ¶19 [Emphasis added].

Appellants' underlying motion to compel arbitration, made pursuant to the Federal Arbitration Act, 9 U.S.C. §1 *et seq.* ("FAA") should have been granted on the facts presented to the District Court. As shown below, the District Court's Order unfortunately applied an erroneous legal standard, and erroneously applied this standard to the facts presented. Respondent Lim offered no valid legal defense to enforcement of the delegation clause. In fact, his claims of "unconscionability" were defective as a matter of law. In addition, Respondent's challenge targeted terms in the Arbitration Agreement which were unrelated to the application of the Delegation Clause (and therefore improper to consider at this stage, under established law).

Under the FAA, arbitration should have been ordered. The Order of the Court (ER 1-20) should be reversed.

II. THE FAA REQUIRED THE DISTRICT COURT TO ENFORCE THE CLEAR AND UNAMBIGUOUS DELEGATION CLAUSE AS A SEVERABLE AGREEMENT WITHIN THE CONTRACT

A. Under The FAA, Delegation Clauses In Arbitration Agreements Are Severable, And Must Be Enforced In The Absence Of Ordinarily Applicable Contract Defenses

The Federal Arbitration Act ("FAA") provides that "[a] written provision in

any … contract evidencing a transaction involving commerce to settle by arbitration a controversy … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of the contract." 9 U.S.C. §2. "Commerce" is defined as commerce among the several States. 9 U.S.C. §1. See also, *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1743 (2011) ("The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.").

Under the FAA, arbitration agreements are enforced unless subject to revocation by generally-applicable state law defenses, "but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("*Concepcion*"); *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612, 1622 (2018) ("*Epic Systems*"); 9 U.S.C. §2. The law mandates "a sort of 'equal-treatment' rule for arbitration contracts"; no special "arbitration defenses" are permitted. *Epic Systems*, *supra*, 138 S.Ct. at 1622; see also, *Kindred Nursing Centers L.P. v. Clark*, 581 U.S. __, 137 S.Ct. 1421, 1426 (2017); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013) ["California's generally applicable rule against unconscionable contracts is preempted by the FAA, if the specific application of the rule disproportionately impacts arbitration."].

B. Under The FAA, Any Threshold Challenges To Enforcement Of A Delegation Clause Are Strictly Limited To How Provisions Affect The *Delegation* Clause, And Not The Arbitration Agreement As A Whole, Or The Hearing On Merits Of The Claims.

A delegation clause is a severable agreement within an arbitration agreement to arbitrate "arbitrability" issues, rather than to have these threshold matters determined by a court. It is required to be "clear and unmistakable." Here, the District Court easily and correctly found that the parties' Delegation Clause "meets this standard." ER 17.[16]

Under the FAA, courts must treat a delegation clause as a separate, free-standing agreement, and any challenges to the enforceability of a delegation clause must be addressed as a threshold issue, independent from any challenges to either the arbitration agreement containing the clause, or challenges to the terms of any other agreements between (or binding) the parties. Equally important, is the requirement that any challenge to a Delegation Clause must be focused entirely on

[16] The Arbitration Agreement also expressly incorporates "the Commercial Rules of the American Arbitration Association," which delegate arbitrability issues to the arbitrator. ER 535 at ¶19. In *Brennan v. Opus Bank*, 796 F.3d 1125, 1128 (9th Cir. 2015) this Court considered an arbitration clause stating, "any controversy or claim ... shall be settled by binding arbitration *in accordance with the Rules of the American Arbitration Association*." *Id.* (emphasis added), and concluded that, at least between sophisticated parties, "**incorporation of the AAA Rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability**." *Id.* at 1130 (internal quotation marks omitted; emphasis added). In so doing, the Court sided with " '[v]irtually every circuit to have considered the issue.' " *Id.*; see also *Shivkov v. Artex Risk Solutions*, __ F.3d __, 2020 WL 5405687, at *12 (9th Cir., Sept. 9, 2020).

issues directly connected to the hearing on arbitrability *itself*, and only as they affect the *delegation* of the issues to the arbitrator. Any arguments pertaining to how a challenged provision of the agreement may affect the parties in regard to the procedures for the arbitration on the merits cannot be considered, as that is the province of the arbitrator. Further, the enforceability of the Delegation Clause cannot concern how the arbitrator might rule on issues delegated by the parties.

Our Supreme Court strongly reaffirmed this principle recently, in *Henry Schein, Inc. v. Archer and White Sales* ("*Henry Schein*"), 139 S.Ct. 524, 527 (2019):

> Under the [FAA] and this Court's cases, the question of who decides arbitrability is itself a question of contract. *The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes*. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70, 130 S.Ct. 2772 (2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–944, 115 S.Ct. 1920 (1995). (Emphasis added.)
>
> We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649–650, 106 S.Ct. 1415 (1986). A court has " 'no business weighing the merits of the grievance' "because the " 'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.' " *Id*., at 650, 106 S.Ct. 1415 (quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568, 80 S.Ct. 1343 (1960)).
>
> That *AT & T Technologies* principle applies with equal force to the threshold issue of arbitrability. **Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator**.

California cases have followed *Rent-A-Center*'s analysis, stating that "a delegation clause nested in an arbitration provision is severable from the remainder of the contract and the question of its enforceability is for the court to decide *if* a challenge is directed specifically at the validity of the delegation clause." *Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 30 Cal.App.5th 970, 979, 242 Cal.Rptr.3d 87 (2018). Thus, "a party's challenge to the arbitration agreement [as a whole] does not invalidate the delegation clause, and therefore the arbitrator, and not a court, must consider any challenge to the arbitration agreement as a whole." *Tiri v. Lucky Chances, Inc.*, 226 Cal.App.4th 231, 240, 171 Cal.Rptr.3d 621 (2014) ("*Tiri*"). "[W]hether the arbitration agreement as a whole is ultimately held to be unenforceable will have no bearing on the enforcement of the delegation clause itself." *Malone v. Superior Court*, 226 Cal.App.4th 1551, 1559, 173 Cal.Rptr.3d 241 (2014) ("*Malone*").

Based on these firmly-established principles, the District Court clearly erred by refusing to compel arbitration of all arbitrability issues, as shown below.

III. THE DELEGATION CLAUSE IN LIM'S CONTRACT WAS *NOT* "UNCONSCIONABLE" OR OTHERWISE UNENFORCEABLE AS ASSERTED BY RESPONDENT LIM

A. Nature Of The "Unconscionability" Defense Applied To Delegation Clauses In Arbitration Agreements.

The FAA allows courts to refuse to enforce arbitration agreements (including delegation clauses) based on state-law defenses generally applicable to contracts.

However, such defenses cannot implicate the inherent nature of arbitration or arbitration agreements. Under California law, one such defense is "unconscionability." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S.Ct. 2520 (1987).

Like all defenses, it is unquestioned that the burden of raising and proving all elements necessary to establish a provision's unconscionability must be borne by the party challenging enforcement of the arbitration agreement (or delegation clause). See, *Sanchez v. Valencia Holding Co.*, 61 Cal.4th 899, 911 (2015); *Tompkins v. 23andMe, Inc.* ("*Tompkins*"), 840 F.3d 1016, 1023 (9th Cir. 2016); *Aanderud v. Superior Court*, 13 Cal.App.5th 880, 890 (2017).

Under California law, "unconscionability has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided results.'" *Armendariz, supra*, 24 Cal.4th at 114 (citation omitted). Both elements must be present to find an agreement unconscionable, but courts employ a "sliding scale," whereby a stronger showing on one may make up for a weaker showing on the other. *Id*. Significantly, to prove an agreement to be unconscionable, it must be shown that the unconscionability existed at the time the agreement was entered.

As noted in *Tompkins*, *supra*, 840 F.3d at 1023 (citations omitted, emphasis added),

> Under California law, an evaluation of unconscionability is highly dependent on context; California courts give the parties a reasonable opportunity to present evidence as to the provision's commercial setting, purpose, and effect, and then examine *the context in which the contract was formed and the respective circumstances of the parties as they existed at the formation of the agreement*. Cal. Civ. Code § 1670.5.

Procedural unconscionability assesses the circumstances under which the agreement was reached. Under California law, the procedural element is "focus[ed] on 'oppression' or 'surprise' due to unequal bargaining power…" *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746, 563 U.S. 333, 340 (2011), citing *Armendariz, supra*, 24 Cal.4th at 114 (2000). For that reason, it is personal to the plaintiff. See *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1146 (2013). In some cases, therefore, identical terms can be unenforceable as to one plaintiff, but enforceable as to another. "Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." *Morris v. Redwood Empire Bancorp*., 128 Cal.App.4th 1305, 1321 (2005).

To find a delegation clause "substantively unconscionable" the term must be more than just "unfair" or a "bad bargain." The term must be "so one-sided as to 'shock the conscience.' " *Pinnacle, supra*, 55 Cal.4th at 246; see *Tarver v. State Bar*, 37 Cal.3d 122, 134 (1984) ["so exorbitant and wholly disproportionate to the services performed as to shock the conscience"]; see also *Armendariz, supra*, 24

Cal.4th at 114 ["overly harsh or one-sided"]; *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 820 (1981) ["unduly oppressive"].

B. Respondent Lim's Evidence, Even If Credited, Established Only A Low To Moderate Level Of Procedural Unconscionability

Aside from producing evidence that the parties had agreed to, essentially, a "form contract," little evidence was offered by Respondent to show procedural unconscionability. See e.g., ER 484-485.[17] It was not disputed that he signed the doc and initialed every page. The Arbitration Agreement was plainly worded, plainly labeled ("**19. DISPUTE RESOLUTION**"; original emphasis), and it appeared on page 7 of a 9-page form. ER 535-536. While Respondent claimed he did not understand what "arbitration" meant (see ER 484-485), what it means *here* is apparent from the plain language used in the parties' agreement.[18]

[17] Lim's declaration on these matters consists almost entirely of assertions that parts of the Contract were not explained and conclusory statements asserting that for unexplained reasons he had no "opportunity" to understand the Contract. See e.g., para ¶ 19 ["I was not given an opportunity to read through the document and no one explained the terms or what they meant."]

[18] California law assumes a party who signs an agreement has read and understood it. *Mission Viejo Emergency Medical Assoc. v. Beta Healthcare Grp.*, 197 Cal.App.4th 1146, 1156 (2011); *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng., Inc.*, 89 Cal.App.4th 1042, 1049 (2001). A language barrier is no excuse from an agreement's obligations unless the party with the barrier can show the other party knew of it and tricked or deceived them into signing the agreement. *Randas v. YMCA of Metropolitan Los Angeles*, 17 Cal.App.4th 158, 163 (1993).

Accordingly, the District Court found that procedural unconscionability was present because "the circumstances show a degree of unfair surprise and oppression that left Plaintiff without an ability to negotiate and [allowed] to make only a take-it-or-leave-it decision." This is a fairly low level of procedural unconscionability under California law. See *Wiseley v. Amazon.com, Inc*., 709 Fed.App'x 862, 863-64 (9th Cir. 2017) ["[A]dhesion ... creates only a minimal degree under California law," citing *Poublon v. C.H. Robinson Co*., 846 F.3d 1251, 1261-62 (9th Cir. 2017); *Baltazar* v. *Forever 21, Inc*., 62 Cal.4th 1237, 1245 (2016)]. Indeed, a "contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules ... operate to render it otherwise." *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 925 (1985) (quoting *Graham v. Scissor–Tail, Inc*., 28 Cal. 3d 807, 819-20 (1981)). "Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." *Morris v. Redwood Empire Bancorp*., 128 Cal. App.4th 1305, 1321 (2005).

As noted in *Ajamian v. CantorCO2e*, 203 Cal.App.4th 771, 796 (2012), "[w]here there is no other indication of oppression or surprise, the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforced unless the degree of substantive unconscionability is high."

In light of the rather ordinary level of "procedural unconscionability" attaching to the parties' agreement to the Contract, the Court next moved on to consider the substantive attacks on the enforceability of various provisions challenged by the Respondent. In that analysis, the District Court erred materially. Since the District Court considered unconscionability together with other attacks, Appellants will address the arguments made against each of the challenged provisions regarding substantive unconscionability, as well as any other challenges, in order, below.

IV. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE DELEGATION CLAUSE IN LIM'S CONTRACT, BASED ON THE PROVISIONS TARGETED BY RESPONDENT.

A. The District Court Erred In Considering The Attorney Fees/Costs Provision In Its Analysis Of The Enforceability Of The *Delegation Clause*, Where That Provision Did Not Allow For Any Costs Or Fees To Be Awarded Based On The Determination Of Arbitrability And Applied Solely To The Determination On The Merits.

In opposing the delegation of arbitrability issues to an arbitrator, Respondent argued to the District Court that the Attorney Fees/Costs Provision rendered the Delegation Clause unconscionable. ER 507. On its face, it is apparent that this provision does not relate to the determination of arbitrability. In fact, it would not even apply, *if at all*, until after the final ruling on the merits of the claims underlying Respondent Lim's lawsuit!

The Attorney Fees/Costs Provision is not part of the Arbitration Agreement. Instead it appears in Paragraph 23 of the Contract. It reads, *in its entirety*, as follows:

> 23. ATTORNEY'S FEES. If any action is necessary to enforce or interpret the terms of this Agreement [the Contract between the parties], the prevailing party shall be entitled to recover its attorney's fees, costs and disbursements in pursuing such action.

The District Court stated that this provision was "also significant," to its determination that "[b]ased on the nature of the procedural and substantive unconscionability, the Delegation Clause is unenforceable." ER 17. ***This was in error.*** The Attorney Fees/Costs Provision should not have been considered at all in regard to the Delegation Clause, as it clearly would apply only after the determination of Respondent's claims "on the merits." As such, the enforceability and effect, if any, was clearly and unmistakably delegated to the arbitrator. *Henry Schein*, 139 S.Ct. at 527; *Rent-A-Center*, 561 U.S. at 70-74; *Brennan*, 796 F.3d at 1132-1133.

Here, the Respondent is pursuing an Action for damages, based on assertions that he was misclassified and should have been treated as an "employee" of Appellants. It is well established that when a provision of a Contract contains a provision for an award to the "prevailing party" in an action, the "prevailing party" is determined only at the conclusion of the determination of the action on the merits. That is not the type of determination made at an arbitrability hearing. As made very

clear in multiple decisions by both this Court and our Supreme Court over the past two decades, the determination of arbitrability is a "severable" and "threshold" issue – it is separate from a determination on the merits. See *Henry Schein*, 139 S.Ct. at 527; *Rent-A-Center*, 561 U.S. at 70-74; *Brennan*, 796 F.3d at 1132-1133.[19]

In its Order, the District Court acknowledged, "[i]t does not appear that either party would be the 'prevailing party' solely based on a decision on arbitrability." However, the District Court went on to rule that this provision was "also significant," to its ultimate determination that "[b]ased on the nature of the procedural and substantive unconscionability, the Delegation Clause is unenforceable." ER 18. Under the authority cited above, this was in error.

B. The District Court Erred In Holding That The "Venue Provision" Rendered The Delegation Clause Unconscionable And/Or Unenforceable Under California Law

1. Respondent Lim offered no evidence to meet his burden of proving that the Venue Provision rendered the Delegation Clause "unconscionable *at the time it was entered*," as required by California law.

[19] ***Pokorny v. Quitar, Inc.***, 601 F.3d 987, 1004 (9th Cir. 2010), *overruled on other grounds by Poublon*, 846 F.3d 1265-66, **cited by the District Court (ER 16), is inapposite authority**. It merely held that *in the absence of delegation clause*, a court may consider an attorneys' fees provision when considering *whether arbitration agreement "as a whole" is enforceable*. *Ortolani v. Freedom Mrtg.*, 2017 WL 10518040 (C.D.Cal. 2017); *Chavarria v. Ralphs Groc.*, 733 F.3d 916 (9th Cir. 2013), and *Antonelli v. Finish Line*, 2012 WL 525538 at *5 (2012), also cited by the District Court (ER 16) are also unavailing. None considered arbitration fees to be oppressive as to the enforcement of a *delegation clause* – a very different issue from fees for a full "merits hearing." See *Rent-A-Center*, *supra*, 130 S.Ct. at 2780, 561 U.S. at 74.

The Venue Provision in the Arbitration Agreement, in Paragraph 19 of the Contract reads, simply: "The place of the arbitration shall be Dallas, Texas." ER 536 (see also ER 5). Respondent claims this provision renders the Delegation Clause unconscionable or unenforceable under California law, citing potential costs and inconvenience. ER 505-507. In considering this very issue of state law, the California Court of Appeal was unanimous in enforcing this same Delegation Clause, on the ground that the challenge was not properly limited to provisions affecting the Delegation Clause itself. The Court noted:

> [P]laintiffs also argued the delegation clause was unconscionable because it required them to arbitrate the question of arbitrability in Texas to determine whether an arbitration would proceed. **But venue does not apply solely to the delegation clause and thus cannot be considered in analyzing the unconscionability of the delegation clause.**
>
> Contentions that the entire arbitration paragraph is unconscionable are not sufficient to challenge the delegation clause itself. "[A]ny claim of unconscionability must be specific to the delegation clause. [Citation.]" (Tiri v. Lucky Chances, Inc., supra, 226 Cal.App.4th at p. 244, citing Rent–A–Center, supra, 561 U.S. at p. 73; italics omitted.) Thus, the several arguments in plaintiffs' brief directed toward the unconscionability of other provisions in the arbitration paragraph are unavailing.

Kohsuwan v. Dynamex, Inc., 2015 WL 3457280, at *3 (Cal.App. 4 Dist., 2015).

That should end discussion of the Venue Provision. However, even if it were to be considered, California requires that "substantive unconscionability must be evaluated as of the time the contract was made." *A & M Produce Co. v. FMC Corp.*,

135 Cal.App.3d 473, 487 (Cal.App. 1982); accord *Ingle v. Circuit City Stores*, 328 F.3d 1172 (9th Cir. 2003) (quoting *A & M Produce*, 135 Cal.App.3d at 487). Defendant Lim's own Opposition to the Appellants' Motion to Compel acknowledged this requirement. ER 512. ["'Unconscionability is measured as of the time the contract was entered,' not based on subsequent events," quoting *McCaffrey Group, Inc. v. Super. Ct.*, 224 Cal.App.4th 1330, 1350 (2014) and citing Cal. Civ. Code § 1670.5]; see also ER 509.

Yet, Respondent offered absolutely no evidence that the venue provision would have imposed a financial hardship upon him *at the time that the contract was made* May 18, 2011. Instead, all evidence submitted on the issue came from his own October 21, 2019 declaration, and pertained to his *current* financial condition as of that date, *more than eight (8) years after entering the Contract*. ER 485-486. Respondent conspicuously chose not to offer any evidence of his financial condition or ability to travel at the *relevant* time. Respondent also failed to offer any evidence regarding the AAA fees or travel costs at the relevant time. See also, ER 478-486[20]

[20] Respondent submitted a declaration of his attorney (ER 479), which attached a fee schedule relating to certain Commercial Rules matters, but no facts were stated establishing that the fee schedule would ever apply to Lim's case. In fact, the AAA Commercial Rules clearly provide for a special schedule to be used in cases where employee-type claims are alleged by a contractor or employee. See, *Abernathy v. DoorDash, Inc.*, 438 F.Supp.3d 1062, 1064 (N.D.Cal., 2020) ["AAA's Commercial Arbitration Rules require each individual to pay a filing fee of $300 and the responding company to pay a filing fee of $1,900."]; see *Yu v. Volt Info. Sciences*,

Respondent Lim offered no evidence whatsoever that his personal attendance would be required, helpful, or even desired at a hearing on arbitrability – *regardless* of where held.[21] The only related "evidence" is that Respondent made *no* appearance at the arbitrability hearing already held in this very case. When this Court did not enforce the delegation clause, it proceeded to rule on arbitrability. No live testimony was offered (or even suggested). Respondent testified by declaration. ER 172-212. At that hearing, Respondent's lack of personal *physical presence* was irrelevant, as it would be at any other such hearing.

In fact, having already fully prepared and submitted all arbitrability issues to the District Court, it is clear that no travel or "missing of work" would be required for Lim to submit the same or similar declarations he submitted to the District Court

---

2019 WL 3503111, at *6, n. 40 (N.D.Cal. 2019) [AAA fees not unconscionable; are less than District Court filing fees.]

[21] Today, hearings are often held remotely. *E.g.*, 9th Cir. Notice of Cases Set for Hearing ["… argument will be held remotely [with] counsel appearing by video or telephone."] (http://cdn.ca9.uscourts.gov/datastore/uploads/forms/hearing_notice/ntc_hear.pdf). See also in *VieRican, LLC v. Midas International, LLC*, 2020 WL 4430967, at *6 n. 10 (D.Hawaii 2020) (citing AAA's Commercial Arbitration Rule 32 provision for "presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences" in holding the plaintiff had failed to demonstrate it would be required to travel to an inconvenient forum to litigate arbitrability.)

– along with the same briefs and argument – to have the issue of arbitrability determined by an arbitrator sitting in Dallas.[22]

2. Respondent Lim failed to offer any evidence to meet his burden to prove that the Dallas Venue Provision made vindication of Lim's right to challenge arbitrability "prohibitively costly".

The District Court did not, in fact, specifically determine that the venue provision was "unconscionable at the time it was entered," as *required* to constitute unconscionability under California Civil Code § 1670.5. Instead, the Court found that when "[v]iewed collectively, the arbitration venue and Plaintiff's financial circumstances show that the Delegation Clause *is* so 'prohibitively costly' as to deprive Plaintiff of any proceeding to vindicate his rights." ER 17. While sometimes loosely characterized as an issue of unconscionability, this is a different defense from statutory "unconscionability," under California statutes (Civil Code §1670.5) and case law. See, *e.g.*, *Armendariz*, *supra*, 24 Cal.4th 83, 122. See also *Miyasaki v. Real Mex Restaurants, Inc.*, 2006 WL 2385229, at *6 (N.D. Cal. Aug. 17, 2006) (citation omitted) ["A validity challenge based on an unconscionable [provision] is conceptually distinct from a challenge based on the plaintiff's inability to vindicate statutory rights in the arbitral forum. The former relates to the validity of the

[22] Nor was any showing made by Respondent Lim that his *attorneys* would have to travel to Dallas to meet the arbitrator face-to-face, as opposed to presenting arguments telephonically or via video-conference, as noted above.

agreement itself, while the latter relates to the adequacy of the forum to hear the particular claim."]. This "inability to vindicate rights" defense requires different proof.

As described in *Green Tree Fin. Corp.-Ala. v. Randolph* ["*Green Tree*"], 531 U.S. 79, 90 121 S.Ct. 513, 522 (2000), this defense arises when a party presents evidence proving that the party "*will be* required to bear prohibitive arbitration costs and thereby be unable to vindicate [the party's] statutory rights in arbitration." (Emphasis added.) This Court elaborated in *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1212 (9th Cir. 2016), that this "effective vindication doctrine" "provides courts with a means to invalidate, on public policy grounds, arbitration agreements that operat[e] as a prospective waiver of a party's right to pursue statutory remedies," such as by imposing "filing and administrative fees attached to arbitration that . . . make access to the forum impracticable." Relevant to this case, *Green Tree* makes clear that articulating a speculative 'risk' that a party *might* have to bear fees if the contract were enforced to the letter is insufficient. Rather, the party seeking to invalidate the agreement "bears the burden of *showing the likelihood of incurring such costs*." 531 U.S. at 91 (emphasis added).

Here, not only did Respondent fail to make such a showing, but Appellants conclusively established the contrary through undisputed evidence that no such fees would be incurred by Respondent. Appellants had, in fact, agreed to pay all such

fees – not only for the hearing on arbitrability, but also in regard to the hearing on the merits. ER 404 and ER 435.

However, even when applied to a full hearing on the merits, this Court has noted that, "California appellate courts considering forum selection clauses in adhesion contracts have held that '[n]either inconvenience nor additional expense in litigating in the selected forum is part of the test of unreasonability.'" *Tompkins*, *supra*, 840 F.3d at 1028 (quoting *Cal-State Bus. Prods. & Servs. v. Ricoh*, 12 Cal.App.4th 1666, 1679 (1993)). In fact, California courts *must* enforce a forum clause unless "the forum selected would be *unavailable* or *unable to accomplish substantial justice*." *Poublon v. C.H. Robinson*, 846 F.3d 1251, 1264-65 (9th Cir. 2017); see *Rafeh v. Gold Star Mortgage*, 2019 WL 3067199, at *5 (C.D.Cal. 2019). Nothing submitted by Respondent meets, or addresses, this standard.

This issue was also addressed recently by the District Court in *VieRican, LLC v. Midas International, LLC*, 2020 WL 4430967, at *6 (D.Hawaii 2020). In that case, Plaintiff argued that requiring it to travel to Florida from its base in Hawaii to arbitrate arbitrability was "unconscionable" because it would incur great cost and expense. The Court rejected that argument, citing *Gountoumas v. Giaran*, 2018 WL 6930761, at *10 (C.D.Cal. 2018):

> The Court finds persuasive *Gountoumas*, which held—in response to a similar challenge—that arguments regarding inconvenience and expense were not specific enough to the delegation provision **because the plaintiff had not shown she would be required to travel to the**

> **inconvenient forum to litigate the limited issue of arbitrability or incur prohibitive expenses in litigating that issue.** See 2018 WL 6930761 at *11. The same is true here, where Plaintiff has not demonstrated the inconvenience and unconscionability of the chosen forum for resolving the dispute regarding whether the arbitration clause itself governs its claims here.

Indeed, in the case at hand, it would be *impossible* for the Respondent to have made such a showing, since it was established as a matter of fact that Appellants had already agreed to arbitration of all issues in *Los Angeles*, had already paid the filing fees for the arbitration, and had specifically *agreed to pay all arbitration fees* for the resolution of this dispute. This Court addressed a nearly identical situation four years ago in *Mohamed v. Uber Techs.*, *supra*, 848 F.3d 1201. There, the defendant had "committed to paying the full costs of arbitration." *Id*. at 1212. This Court held that "the fee term in the arbitration presents Plaintiffs with no obstacle to pursuing vindication" of their statutory rights, rejecting plaintiff's assertion of the defense. *Id*.

Despite the fact that it had already been shown by uncontroverted evidence that the Respondent would not *in fact* be required to travel to Dallas, and would not incur any "excessive" or "prohibitive" arbitration fees in connection with the arbitration of arbitrability issues (and, for that matter, any other issues) by virtue of Appellant's promise to hold any hearing in Los Angeles and to pay all fees, the District Court found that the venue provision contributed to render the Delegation Clause "prohibitively costly."

The District Court based this determination on findings that the Respondent "*would be required to arbitrate in Dallas*, Texas" and "'cannot afford to travel to Dallas, Texas,' and leave his daughter and work for a significant period of time." ER 17. However, no evidence was offered to counter the fact that the Dallas venue provision had been waived.[23] In fact, the Court acknowledged the waiver, but erroneously rejected its significance in eliminating any chance that Respondent would have to incur "prohibitive" costs to vindicate his rights in an arbitrability hearing conducted by an arbitrator:

> "That [Appellants] now waive elements of the Delegation Clause related to venue, costs and filing fees does not change the analysis of whether the delegation Clause, as drafted, is unconscionable." ER 18.

This finding was in error, particularly as limited, as required, to the Delegation Clause. As noted above, no evidence had ever been presented by Respondent to establish that the venue clause rendered the Delegation Clause unconscionable, *when it was drafted*. The only evidence offered was intended to show the venue would be too prohibitively costly to allow Respondent to vindicate his rights "*currently*." Nor was any evidence presented that these provisions would have been "prohibitively costly" to Respondent *when made*, as required to show "unconscionability."

[23] For that matter, no showing was made that any "excessive costs" would be incurred in arbitrating the limited issue of arbitrability *in Dallas*, nor was evidence presented that these costs had even been investigated.

C. Respondent Lim Did Not Present Any Evidence To Meet His Burden Of Proving That The Fee Split/Waiver Provision Was Unconscionable Or Unenforceable

1. The District Court improperly found the Fee Split/Waiver Provision unconscionable based on concern that the arbitrator might not rule properly in providing relief to Respondent.

The Arbitration Agreement's Arbitration Fee Split/Waiver Provision (which, as noted above, has already been waived by Appellants) does *not* require that Respondent pay half the fees for the arbitration. Instead, it provides that the fees will be split *only if* the Respondent fails to show "that the arbitration fees will impose a substantial hardship" on Respondent.

The Fee Split/Waiver Provision appears in Paragraph 19 of the Contract. It reads as follows:

> The parties agree that the arbitration fees shall be split between the parties, unless CONTRACTOR shows that the arbitration fees will impose a substantial financial hardship on CONTRACTOR as determined by the Arbitrator, in which event DYNAMEX will pay the arbitration fees. [ER 536.]

On its face, this provision is clearly not substantively unconscionable. It expressly requires Appellants to pay *all* arbitration fees if arbitration fees would impose a "substantial hardship" on Respondent. By its own terms, therefore, the Arbitration Fee Split/Waiver Provision *cannot* operate in a way that would "shock the conscience," (*Pinnacle*, *supra*, 55 Cal.4th at 246; *Tarver*, *supra*, 37 Cal.3d at

134), be "overly harsh or one-sided" (*Armendariz*, *supra*, 24 Cal.4th at 114), or be "unduly oppressive" (*Graham v. Scissor-Tail*, *supra*, 28 Cal.3d at 820).

The District Court, however, noted that the agreement required this determination to be made "*by the Arbitrator*," rather than by the Court. ER 17. The FAA requires that delegation of issues is to be enforced by the Court. However, the District Court ruled that the mere *possibility* that relief would not be granted by the arbitrator when justice required such relief, was enough to determine that the Arbitration Fee Split/Waiver Provision "imposes a 'type of expense that the employee would not be required to bear if he or she were free to bring the action in court.' *Armendariz*, 24 Cal.4th at 110-11." ER 18. Tellingly, the District Court based its holding on its belief that,

> There is no assurance that such relief would be granted. And, *if denied*, this could expose [Lim] to the risk of a corresponding fee award. Therefore, the cost-splitting provision in this employment context is unconscionable under California law. ER 18.

It is a fundamental principle of the FAA that is improper to base a determination of unconscionability on speculation that an arbitrator may not make the "proper ruling" – or may rule differently from the court.

A similar claim regarding costs was duly rejected by the Supreme Court in *Green Tree* (*supra*, 531 U.S. at 91) as "too speculative to justify the invalidation of an arbitration agreement" (emphasis added) because the division of such costs was not yet established by the arbitrator to whom the issue was delegated. See *PacifiCare*

Health Sys. v. Book, 538 U.S. 401, 406-07 (2003) [Court cannot deny arbitration over speculation about a future ruling.]

2. Respondent Lim also offered no evidence to meet his burden of proving that the Fee Split/Waiver Provision rendered the Delegation Clause "unconscionable" specifically "at the time it was entered" as required by California law.

Very simply, as noted above regarding the Venue Provision, Respondent offered no evidence of his financial condition *at the time of his agreement* to the terms of the Delegation Clause. However, in finding that the fee-splitting provisions rendered the delegation clause of the parties' agreement unconscionable, the District Court again considered *only* evidence of Plaintiff's *current* financial condition.

Under California law, courts may refuse to enforce a contract as "unconscionable" only if it is found "to have been unconscionable *at the time it was made*." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011) (emphasis added); *see also* Cal. Civ. Code § 1670.5(a).

V. THE DISTRICT COURT ERRED IN FAILING TO APPLY THE SEVERANCE CLAUSE IN THE PARTIES' CONTRACT, AND IN FAILING TO APPLY WELL-ESTABLISHED PRINCIPLES OF LAW, TO SEVER "UNCONSCIONABLE" TERMS TO PERMIT ENFORCEMENT OF THE DELEGATION CLAUSE

As noted above, the parties' Contract contained a clear and direct *Severability Clause*. The Contract provides (at ¶29): "**SEVERABILITY. If any part of this Agreement is held unenforceable, the rest of the Agreement will continue in**

effect." ER 537. [Emphasis added]. The parties' agreement to sever any unenforceable terms could not have been clearer. In *Pereyra v. Guaranteed Rate, Inc*., 2019 WL 2716519 ("*Pereyra*"), at *10 (N.D.Cal. 2019), the Court noted:

> Severability "clauses evidence the parties' intent that, to the extent possible, the valid provisions of the contracts be given effect, even if some provision is found to be invalid or unlawful." *Baeza v. Superior Court*, 201 Cal.App.4th 1214 (2011). "The presence of a severability clause makes severance more feasible." *Smith v. Vmware, Inc*., 2016 WL 54120, at *6 (N.D.Cal. 2016); *Grabowski v. C.H. Robinson Co*., 817 F.Supp.2d 1159, 1179 (S.D.Cal. 2011) (severing unconscionable provisions in part because the agreement had a severability clause).
>
> "[A] court should sever an unconscionable provision unless the agreement is so 'permeated' by unconscionability that it cannot be cured by severance." *Serafin* [*v. Balco Props. Ltd*, 235 Cal.App.4th 165 at 183-84 (2015)].

See also *Poublon v. C.H. Robinson*, 846 F.3d 1251, 1273 (9th Cir. 2017); *Dotson v. Amgen*, 181 Cal.App.4th 975, 986 (2010).

The FAA requires a court to interpret the terms of the parties' agreement in such a manner as to *preserve the agreement to arbitrate*. The FAA does *not* allow courts to interpret contract terms applicable to an arbitration agreement in a manner different from their interpretation outside of the arbitration context, to make them less enforceable. See *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) ("A court may not ... construe [terms of an arbitration agreement] in a manner different from that in which it otherwise construes nonarbitration agreements under state law."); *accord, AT&T Mobility v. Concepcion*,

563 U.S. at 341 ("a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.")

Here, the District Court refused to apply the Severability Clause in the parties' Contract to sever the provisions it found to have rendered the Delegation Clause unenforceable. It did so, purportedly, on the authority of *Saravia*, *supra*, which itself relied on *Armendariz, supra*, 24 Cal.4th 83. ER 18. *This was in error*.

Armendariz addressed a situation in which a court found multiple provisions of an arbitration agreement to have been "unconscionable" as provided by state statute. See *Id*., 24 Cal.4th at 114, 120-124 ["Civil Code section 1670.5 … codified the principle that a court can refuse to enforce an unconscionable provision in a contract."].[24] Under state law, a court may refuse to enforce an arbitration agreement "***only*** when an agreement is 'permeated by [such] unconscionability.'" *Armendariz*, 24 Cal.4th at 122 (emphasis added). For example, courts apply *Armendariz* by

[24] *Armendariz*, 24 Cal.4th at 122, also noted:

> [Civil Code] [s]ection 1599 states that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." In *Keene v. Harling* (1964) 61 Cal.2d 318, 320-321 (*Keene*), we elaborated on those provisions: " 'Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties. If the contract is divisible, the first part may stand, although the latter is illegal. [Citation.]' [citations.]…." [also citing *Birbrower, et al. v. Superior Court* (1998) 17 Cal.4th 119, 137-139, 70 Cal.Rptr.2d 304 [legal terms in attorney fee agreement severable from illegal portions].

looking at whether the offending provisions "indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Id*. at 124; see also *Ferguson v. Countrywide Credit Industries, Inc.* ("*Ferguson*"), 298 F.3d 778, 787-88 (2002) [Arbitration agreement was "permeated by unconscionable clauses" due to unfairness in "lack of mutuality regarding the type of claims that must be arbitrated, the fee provision, and the discovery provision."]; *Farrar v. Direct Commerce, Inc*., 9 Cal.App.5th 1257, 1274-75 (2017) [Error for trial court not to sever provisions when appropriate to preserve arbitration agreement].

As shown above, Respondent Lim made no evidentiary showing *at all* in regard to the impact of the Venue Provision or the Arbitration Fee Split/Waiver Provision. None of the evidence offered related to a claim of unfairness regarding the Delegation Clause "at the time it was entered." This is not a technicality. It represents an utter failure of proof on issues that Respondent had the clear burden to raise and *prove*.

Moreover, the concept of "permeated" with unconscionability, as described in *Armendariz*, has no meaningful (or even logical) application to defenses based upon evidence describing conditions arising *after* a contract was entered. It defies logic that an agreement can be found to be *permeated* with unconscionability when it was drafted based solely upon circumstances that were not shown to be present at

that time – but only arose later. As noted by Respondent Lim in his own Opposition to the underlying Motion to Compel (ER 512):

> "Unconscionability is measured as of the time the contract was entered," not based on subsequent events. *McCaffrey* Group, 224 Cal.App.4th at 1350; *see also* Civil Code § 1670.5(a).

Significantly, as noted by this Court in *Tompkins*, *supra*, 840 F.3d at 1030, "California and federal law treat the substitution of arbitration for litigation as the mere replacement of one dispute resolution forum for another, resulting in no inherent disadvantage." (Citing, *inter alia*, Sonic-*Calabasas A, Inc. v. Moreno*, 7 Cal.4th 1109, 1152 (2013) and *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1167 (10th Cir. 2014) [FAA preempts state common law "predicated on the view that arbitration is an inferior means of vindicating rights"].) So the District Court's refusal to enforce the delegation clause due, in part, to a perceived, speculative risk that an arbitrator might make the "wrong" ruling has no support in the law. In fact, that approach conflicts with the federal policy *favoring* arbitration of disputes. See *Moses H. Cone Hospital v. Mercury Constr. Corp*., 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983) ["Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."]

Moreover, the argument that Respondent might be unable to vindicate his rights (the defense that he *actually* attempted to prove, albeit unartfully) was

rendered moot by 1) Appellants' immediate, pre-filing agreement to pay all arbitration costs; 2) Appellants' pre-hearing agreement to proceed to arbitration in Los Angeles instead of Dallas, followed by Appellants' actual filing for arbitration (with all fees paid) in Los Angeles. ER 404-405, ER 435. Finally, no consideration at all is appropriate at this stage regarding the attorneys' fees clause, which applies only to a final determination on the *merits*.

In fact, the Court in *Pereyra*, *supra*, proceeded to sever *four* provisions it found to be unenforceable:

> In this case, the four provisions tainted with unconscionability, while presenting a close question, do not "permeate[ ] the arbitration agreements to such an extent that the purpose of the agreements—i.e., to arbitrate rather than litigate—was transformed—i.e., to impose arbitration 'not simply as an alternative to litigation, but as an inferior forum.'" *Burgoon*, 125 F.Supp.3d at 990 (quoting Armendariz, 24 Cal.4th at 124). See *Poublon*, 846 F.3d at 1273 ("Poublon argues that an agreement is necessarily permeated by unconscionability if more than one clause in the agreement is unconscionable or illegal. We disagree; California courts have not adopted such a per se rule."); *Grabowski*, 817 F.Supp.2d at 1179 (severing "three substantively unconscionable provisions (the 'carve out' provision stating that the Dispute Resolution Agreement does not apply to 'any claims by the Company that includes a request for injunctive or equitable relief'; the confidentiality provision; and the attorney's fees provision)" because of federal policy favoring arbitration); *Pope v. Sonatype, Inc.*, 2015 WL 2174033, at *7 (N.D. Cal. May 8, 2015) (also severing three unconscionable provisions—"(1) [the] trade secret misappropriation injunctive relief carve-out, (2) the requirement that arbitration take place in Washington, D.C., and (3) the requirement that Pope pay attorney's fees unless he is a prevailing party"). **And in view of the severability clause, the unconscionable carve-outs can be severed "without disturbing the primary intent of the parties to arbitrate their dispute." *Openshaw [v. FedEx Ground Package Sys., Inc.],* 731**

> **F.Supp.2d 987, 998 (C.D.Cal. 2010). The objectionable provisions may be severed or construed without re-writing the agreement.**
>
> (Emphasis added.)

In the end, particularly in light of the Severability Clause in the parties' Contract, any of these three provisions determined to render the Delegation Clause unenforceable was required to be *severed* and the remainder of the Delegation Clause enforced.[25]

VI. THE DISTRICT COURT ERRED IN PROCEEDING TO MAKE RULINGS ON ARBITRABILITY ISSUES NOT RELEVANT TO THE ENFORCEMENT OF THE DELEGATION CLAUSE, AND THOSE RULINGS SHOULD BE VACATED.

In *Cipolla v. Team Enterprises, LLC*, 810 Fed.Appx. 562, 563 (9th Cir. 2020), this Court recently faced a similar situation in which the District Court had made rulings on the enforceability of an arbitration agreement "as a whole" in its decision, rather than limiting its consideration to the *delegation clause* within the agreement. The Court found this was in error:

> In contravention of this delegation clause, however, the district court itself considered the "validity" and enforceability of the arbitration agreement by analyzing the unconscionability of portions of the agreement other than the delegation clause. This was error. The Supreme Court has held that "parties can agree to arbitrate gateway

[25] See also *Burgoon v. Narconon of N. California*, 125 F.Supp.3d 974, 990 (N.D.Cal. 2015) (discussing *Armendariz*). See, *e.g.*, *Bermudez*, 2012 WL 12893080, at *14 (severing four provisions including a bilateral shifting of attorneys' fees and a unilateral exclusion from arbitration for a defendant's claims); *Colvin* [*v. NASDAQ OMX Group*], 2015 WL 6735292 (N.D.Cal. 2015), at *9 (severing multiple unconscionable provisions).

> questions of arbitrability" through a delegation clause. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-9, 130 S.Ct. 2772 (internal quotation marks omitted). When such a clause exists, a court should not consider challenges to the agreement – including "substantive unconscionability challenges" – except for "arguments specific to the delegation provision." *Id*. at 73–74, 130 S.Ct. 2772. As a result, "unless [the party opposing arbitration] challenged the delegation provision specifically, we must treat it as valid under § 2 [of the Federal Arbitration Act], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id*. at 72, 130 S.Ct. 2772.

Where, as here, a court makes rulings that are outside of its authority under applicable law, those rulings should be vacated. See *Shapiro v. Paradise Valley Unified School Dist.*, No. 69, 152 F.3d 1159, 1160 (9th Cir. 1998) ("Because we conclude that the district court exceeded its authority . . . we vacate the termination order[.]"); *ATSA of California, Inc. v. Continental Ins. Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985) ["The district court is directed to vacate its January 20, 1984 order. The arbitrators, and not the district court, have authority to determine the applicable law."]. That is exactly what should happen here.

CONCLUSION

The parties' clear and unmistakable agreement to arbitrate all "arbitrability" issues should have been enforced. Any provisions found to be unenforceable should have been severed – both under applicable provisions of California law, and the express "severability" clause of the parties' Contract. The District Court's refused to do so, based on defenses that were unsupported by relevant evidence, and which

targeted terms that were either outside of the scope of the limited analysis permitted of "delegation" issues, or were not central to the core purpose of having these issues determined by an arbitrator.

As such, the defenses offered by Respondent should have been rejected out of hand – but if not, the "offending provisions" should have been severed as agreed by the parties. In fact, as plainly shown by uncontradicted evidence, these provisions had *already* been severed by Appellants' filing for Arbitration in Los Angeles and by Appellants' agreement to pay all arbitration fees, before the District Court had ever ruled on them.

The District Court's order denying arbitration should be reversed. All arbitrability rulings by the District Court should be vacated, and all such matters should be ordered to be referred to arbitration, as stated in the Contract.

Dated: October 14, 2020 MARRON LAWYERS, APC

By: /s/ Steven C. Rice
Paul Marron
Steven C. Rice
Attorneys for Defendants-Appellants
TForce Logistics, LLC and TForce
Final Mile West, LLC

STATEMENT OF RELATED CASES

There are currently no related cases within the meaning of Ninth Circuit Rule 28-2.6.

Dated: October 14, 2020

MARRON LAWYERS, APC

By:/s/Steven C. Rice
Paul Marron
Steven C. Rice
Attorneys for Defendants-Appellants
TForce Logistics, LLC and TForce
Final Mile West, LLC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-55564

I am the attorney or self-represented party.

This brief contains 11,719 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Steven C. Rice **Date** October 14, 2020
(use "s/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by suing the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Steven C. Rice
Steven C. Rice