

NO. 71855-0-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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TRACI TURNER,

Appellant,

v.

VULCAN, INC., et al.,

Respondents.

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Appeal from the Superior Court of Washington  
for King County

Cause No. 12-2-03514-8 SEA

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**REPLY/RESPONSE BRIEF OF  
APPELLANT/CROSS-RESPONDENT TRACI TURNER**

---

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## I. INTRODUCTION

Vulcan<sup>1</sup> accuses Traci Turner of asking this Court to disregard arbitration law and promulgate a new public policy against arbitration in employment actions. However, it is Vulcan that consistently ignores the law. Throughout this case, Vulcan has repeatedly asserted that the court should honor the public policy favoring arbitration above all. But public policy disfavors arbitration unless the party seeking it can prove there is a valid, enforceable arbitration agreement—a question presumptively for the court, not the arbitrator. Turner’s unconscionability claims were also issues for the court, not the arbitrator. Vulcan never met its burden of showing the parties clearly and unmistakably delegated these questions to the arbitrator. The superior court erred by failing to properly address and resolve the merits of Turner’s unconscionability allegations. Res judicata and collateral estoppel do not apply to a non-final order in a case voluntarily dismissed without prejudice.

And Vulcan continues to disparage Turner, arguing she devoted “extraordinary efforts to delay and obstruction”,<sup>2</sup> when what she actually did was stand up for her rights (including the right to voluntarily dismiss her claims in *Turner I*).

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<sup>1</sup> “Vulcan” collectively refers to Vulcan, Inc., Paul and Jody Allen, and its separately-represented executives Colliver and Macdonald, except where Colliver and Macdonald made distinct arguments.

<sup>2</sup> Resp. 1.

Vulcan's arguments fly in the face of Washington courts' clear expressions of public policy upholding employees' vindication of their statutory rights. There is no support for the remanded attorney fee award against Turner, an unrepresented former employee whom Vulcan hauled into arbitration by way of an invalid, unconscionable agreement, then subjected to a surprise fee award for claims it conceded arose out of a common core of facts related to Turner's statutory employment and wage claims. Vulcan's cross-appeal is frivolous.

Turner asks the Court to reverse the order compelling arbitration and remand for trial, reverse the erroneously remanded fee award, affirm Judge Heller's Memorandum Opinion holding that the entire fee award is void in violation of public policy, and grant attorney fees against Vulcan for Turner's prevailing in superior court and on appeal.

## **II. ARGUMENT IN REPLY/RESPONSE TO CROSS-APPEAL**

### **A. Vulcan Has Reversed The Initial Presumption: The Court, Not The Arbitrator, Decides The Gateway Issue Whether There Is A Valid Arbitration Agreement.**

#### **1. Contrary to Vulcan's Mischaracterization, Public Policy Disfavors Arbitration When No Valid Arbitration Agreement Exists.**

In analyzing an arbitration agreement, federal and state courts agree that since "arbitration is a matter of contract", "a party cannot be required to submit to arbitration any dispute which he has not agreed so to

submit.” *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 52-53, (2013), *cert. denied*, 134 S. Ct. 2821 (2014) (quoting *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810 (2009) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)(all internal quotation marks omitted)).

To that end, we have recognized our authority to decide “ ‘gateway dispute[s].’ ” [*Satomi*,] at 809 (quoting *Howsam*, 537 U.S. at 83...). These types of disputes go to the validity of the contract and are preserved for judicial determination, as opposed to arbitrator determination, unless the parties' agreement clearly and unmistakably provides otherwise. *See id.*; *see also Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598 (2013) .... Unconscionability is one such gateway dispute.

*Hill*, at 52-53 (invalidating labor agreement's arbitration clause due to pervasive substantively unconscionable terms);<sup>3</sup> *Weiss v. Lonquist*, 153

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<sup>3</sup> Vulcan attempts to distinguish all the cases cited by Turner at pp. 25-31 of her Opening Br., in one footnote, Resp. 20 n.10. Vulcan first argues without citation that those cases “principally” apply the Washington Uniform Arbitration Act (UAA) and are not as “meaningful” as “binding” U.S. Supreme Court cases applying the FAA, which Vulcan charges Turner with “ignor[ing]”. *Id.* That is false. For example, *Hill* and *Brown v. MHN Government Servs., Inc.*, 178 Wn.2d 258, 262 (2013), among others, involve employment arbitrations applying the FAA. In any event, the Washington and U.S. Supreme Courts have explicitly recognized that the UAA is intended to “incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA”. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 457 (2012). The U.S. Supreme Court quotes the UAA in *Howsam*, at 85 (quoting Rev. UAA of 2000 §6, Cmt. 2, 7 U.L.A. 13 (Supp. 2002), and *BG Grp., PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1207, 188 L.Ed.2d 220 (2014). The “separability” doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) is incorporated in the UAA §6(c) (Washington’s RCW 7.04A.060(3)). The UAA takes into consideration U.S. Supreme Court decisions under the FAA. UAA, 7 pt. 1A U.L.A. 1, prefatory note at 2–3 (2009). Washington cases consult decisions under the FAA and UAA interchangeably. *See, e.g., River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 235 (2012) (considering FAA and state law on issue of waiver of arbitration); *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 375 (2013) (relying on FAA and Washington law regarding compelling arbitration). The Washington Supreme Court acknowledged U.S. Supreme Court law in *Hill*, at 52-53: “Arbitration is a rapidly evolving dispute resolution

Wn. App. 502, 511 (2009) (threshold inquiry under both FAA and UAA is whether the parties entered into a valid agreement to arbitrate); *McKee v. AT & T Corp.*, 164 Wn.2d 372, 404 (2008) (“Courts, not arbitrators, decide the validity of arbitration agreements”).<sup>4</sup> The U.S. Supreme Court recently affirmed that whether there is a valid arbitration agreement to begin with is a “question of arbitrability” for the court:

On the one hand, **courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about “arbitrability.”** These include questions such as **“whether the parties are bound by a given arbitration clause[]”** .... *Howsam* ... [at] 84 ... ; *accord, Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299-300, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (disputes over **“formation of the parties' arbitration agreement”** ... are “matters ... the court must resolve” (internal quotation marks omitted)).<sup>5</sup>

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method. The United States Supreme Court has weighed in several times in the recent past .... These cases confirm an expansive interpretation of the Federal Arbitration Act ... to occupy an increasingly significant role in the field of arbitration.” But our courts adhere to their independent ability, authorized by the FAA, to apply Washington state law to decide gateway disputes going to the validity of the contract. *Hill*, at 53 (citing *Satomi, Howsam*, and *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598 (2013)).

Vulcan also complains that *Brown* (where the court did not mention the UAA), fails to address *Prima Paint*, which Vulcan declares to be “binding.” Apparently in contrast, Vulcan argues *Townsend* “properly applied” *Prima Paint* and citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). It is unclear what Vulcan means by this. The absence of a citation to *Prima Paint* in a Washington decision does not somehow make the Washington decision any less binding. Moreover, *Townsend* is a state arbitration case applying the UAA, not the FAA; following Vulcan’s reasoning, that fact would render *Townsend* less persuasive to the Court than *Hill, et al.*

<sup>4</sup> (Citing *Buckeye*, 546 U.S. at 445).

<sup>5</sup> The *BP Grp.* Court further explained:

On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the **meaning and application of particular procedural preconditions for the use of arbitration.** ...These procedural matters include claims of “waiver, delay, or a like defense to arbitrability[]” ... [a]nd ... satisfaction of ““prerequisites such as time limits, notice, laches,

*BG Grp., PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1206-07, 188 L.Ed.2d 220 (2014). See also *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 n.2, 186 L. Ed. 2d 113 (2013) (questions of arbitrability “include certain gateway matters, such as whether parties have a valid arbitration agreement at all ... are presumptively for courts to decide”); court reviews arbitrator's determination of such matters de novo absent clear and unmistakable evidence that parties wanted arbitrator to resolve dispute).<sup>6</sup> As the Ninth Circuit summarized:

“[U]nlike the arbitrability of claims in general, whether the court or the arbitrator decides arbitrability is an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise*.” ... Thus, there is a presumption that courts will decide which issues are arbitrable.”

*Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th Cir. 2014) (quoting *Oracle Am., Inc. v. Myriad Group A. G.*, 724 F.3d 1069, 1072 (9<sup>th</sup> Cir. 2013)).

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estoppel, and other conditions precedent to an obligation to arbitrate.” *Howsam*, *supra*, at 85... (quoting the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp.2002)).

*Id.*, 134 S. Ct. at 1207. Note that Washington cases on arbitration, including *Hill*, apply *Howsam*. See also, e.g., *Woodall v. Avalon Care Center-Federal Way, LLC*, 144 Wn. App. 919, 923 (2010) (whether a person is bound by an agreement to arbitrate is a legal question that is to be determined by the courts).

<sup>6</sup> Vulcan contends the phrase “clearly and unmistakably” applies only where one of the parties is trying to avoid the effect of the presumptions set up by the FAA. Resp. 18, citing *Howsam*. As explained here, the presumption is that the court decides whether an agreement exists.

Vulcan claims that if an employee challenges both the arbitration clause within a contract as well as the circumstances surrounding signing the contract, then she is attacking the whole contract and the arbitrator must decide. Resp. 17-19.<sup>7</sup> The Ninth Circuit rejected Vulcan's argument in a case Vulcan relied on heavily below, *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991)<sup>8</sup> (declining to extend *Prima Paint*).<sup>9</sup> “[W]hen a party resisting arbitration seeks to show that the contract containing the arbitration clause is void, as opposed to voidable, it is **proper for the district court to resolve the question notwithstanding that it is an attack on the contract as a whole.**” *Davis v. Cascade Tanks, LLC*, No. 3:13-CV-02119-MO, 2014 WL 3695493, at \*8 (D.Or. July 24, 2014) (citing *Three Meadows*, at 1140-41, and *Sanford*

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<sup>7</sup> Citing *Buckeye*, at 445-46, and *Prima Paint*. But as many courts including the Washington Supreme Court and the Ninth Circuit have explained, (e.g., *Three Valleys, Sanford, Buckeye* and *Prima Paint* do not require the arbitrator to decide gateway questions as to whether a contract exists. In this regard, Vulcan contends that where a party contends an agreement is procedurally unconscionable because of the circumstances surrounding its acceptance, the challenge goes to the entire contract and is therefore for the arbitrator, citing *Gore v. Alltel Commc'ns. LLC*, 666 F.3d 1027, 1036-37 (7<sup>th</sup> Cir. 2012) and *Madol v. Dan Nelson Auto. Grp.*, 372 F.3d 997, 1000 (8<sup>th</sup> Cir. 2004). In *Gore*, however, the issue was not about the **existence** of a contract, but rather the **scope** of an arbitration clause in one of two agreements—that is, whether the clause was broad enough to cover a dispute about the other agreement. That is a different question not present here. In *Madol* (a ten-year-old Eighth Circuit case), plaintiffs did not dispute the validity of the dispute resolution agreement in vehicle purchases, but challenged the transactions from start to finish as unconscionable.

<sup>8</sup> E.g., CP 70, CP 88-90, CP 116.

<sup>9</sup> “[W]e read *Prima Paint* as limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to. A contrary rule would lead to untenable results. ... Before a party to a lawsuit can be ordered to arbitrate ..., there should be an express, unequivocal agreement to that effect ... The district court ... should give to the opposing party the benefit of all reasonable doubts and inferences that may arise.” *Three Valleys* at 1140-41.

v. *Member Works, Inc.*, 483 F.3d 956, 962-63 (9th Cir. 2007) (where one party never agreed on the contract as a whole in the first place, it is an issue for the court to decide)).<sup>10</sup>

Thus, under the FAA,<sup>11</sup> the policy favoring arbitration does not apply when there is no valid arbitration agreement in the first place: “[W]here the issue is whether a particular party is bound by the arbitration agreement, the federal policy favoring arbitration does not apply.” *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013). Accordingly, the test for arbitration under the FAA is “not resolved with the ‘thumb on the scale in favor of arbitration because the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.’” *Chambers v. Groome Transp. of Alabama*, No. 3:14-CV-237-WKW, 2014 WL 4230056, at \*7 (M.D. Ala. Aug. 26, 2014);<sup>12</sup> *Momot v. Mastro*, 652 F.3d 982, 987 (9th

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<sup>10</sup> “The order ... interpreted *Prima Paint* as mandating that the court decide all challenges to an arbitration clause but the arbitrator decide all challenges to the contract as a whole. **We rejected this argument in *Three Valleys***”. *Sanford*, at 963 (emphasis added). See also *Freaner v. Valle*, 966 F.Supp.2d 1068, 1080 (S.D. Cal. 2013) (though defendants’ “challenge impeaches **both the contract and the arbitral clause**, it should nonetheless be addressed by the Court because it calls into question the basis of the arbitrator’s jurisdiction. ... It would be unfair to compel Defendants to arbitrate a dispute over mutual assent to the contract because the implication of their argument is that they never agreed to arbitrate any issues at all.”);

<sup>11</sup> Again, the FAA itself provides that arbitration agreements are invalidated on “such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

<sup>12</sup> (Quotation and citation omitted) See also *In re Carrier IQ, Inc. Consumer Privacy Litig.*, No. C-12-MD-2330 EMC, 2014 WL 1338474, at \*4 (N.D. Cal. Mar. 28, 2014) (denying motion to compel); *Bellman v. i3Carbon, LLC*, 563 Fed. App’x 608, 611-12 (10th Cir. 2014) (question “whether parties have a valid arbitration agreement at all” is

Cir. 2011). When, as here, the agreement is silent about who decides arbitrability, the presumption in favor of arbitrability is reversed:

[T]he law treats silence or ambiguity about the question “*who* (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question “*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement” – for in respect to this latter question the law reverses the presumption.

*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Momot*, at 987.<sup>13</sup> “Because such issues [regarding validity of the agreement] would otherwise fall within the province of judicial review,” the court applies “a more rigorous standard

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“presumptively for courts to decide”; denying motion to compel arbitration; quoting *Sutter*, 133 S.Ct. at n.2).

<sup>13</sup> While *Momot* held that the phrase, “If a dispute arises out of or relates to ... **the validity** or application of any of the provisions of this ... Section”, delegated the question to the arbitrator, *id.* at 988, in *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1174-75 (9th Cir. 2014), a clause stating “Any claim or controversy at law or equity that arises out of the Terms of Use, [etc.] ... shall be resolved through binding arbitration” did not clearly and unmistakably delegate the question to arbitrator. The court decides “whether a valid arbitration agreement exists.” *Id.* at 1175. In *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10<sup>th</sup> Cir. 1998), the court held that the phrase in an arbitration clause referring to the arbitrator handling “any and all disputes arising out of or relating to the contract” was not a clear and unmistakable delegation because “there is no hint in the text of the clause or elsewhere in the contract that the parties expressed a specific intent to submit to an arbitrator the question whether an agreement to arbitrate exists.” In *Perez v. Qwest Corp.*, 883 F.Supp.2d 1095, 1114 (D.N.M.2012) (incorrectly cited by Vulcan as supporting defense attorney fees, *see* below), the court held the clause, “Any claim, controversy or dispute between you and U S WEST ... including, but not limited to, disputes relating to the interpretation of this Attachment” did not clearly and unmistakably show the parties intended the arbitrator to decide arbitrability, so the question was for the court. “[A]n arbitration clause committ[ing] all interpretive disputes relating to or arising out of the agreement does not satisfy the clear and unmistakable test.” *Peabody Holding Co., LLC v. United Mine Workers of Am., Int’l Union*, 665 F.3d 96, 102 (4<sup>th</sup> Cir. 2012) (“The ‘clear and unmistakable’ standard is exacting, and the presence of an expansive arbitration clause, without more, will not suffice.”). *See also Local 744, Int’l Broth. of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162, 163–65 (7<sup>th</sup> Cir. 1996) (requiring arbitration of “all differences arising out of the interpretation or application of any provision of [the] agreement” was not clear and unmistakable).

in determining whether the parties have agreed to arbitrate the question of arbitrability.” *Momot*, at 987.

Rather than applying “ordinary state-law principles that govern the formation of contracts” as we would when determining, for example, the scope of a concededly binding contract, the Supreme Court has cautioned that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.”

*Momot*, at 987-88 (emphasis added; quoting *First Options*, at 944); *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 264-65 (2013) (“the issue of arbitrability has not been clearly and unmistakably delegated to the arbitrator on the face of the contract. Therefore, it is proper for us to determine the enforceability of the agreement.”); *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 562-63 (2014)(“the arbitrability issue has not been clearly and unmistakably delegated to the arbitrator on the face of the contract”; court “had subject matter jurisdiction to determine the arbitration agreement's enforceability.”).<sup>14</sup>

Here, the arbitration agreement states: “Any and all claims, disputes, or other matters in controversy on any subject arising out of or related to this Agreement and your employment shall be subject to

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<sup>14</sup> The agreement there stated: “[Y]ou hereby agree to mediate and/or arbitrate any complaint against Firm prior to the initiation of any public or private complaints or claims of any kind against LWG or any of its attorneys[.]” *Id.*

confidential arbitration ...” CP 281.<sup>15</sup> The provision does not clearly and unmistakably demonstrate that the parties agreed an arbitrator would decide the validity of the contract or unconscionability. The court erred in failing to actually address the merits of these questions.

## **2. Unconscionability Is Likewise A Gateway Issue For the Court.**

Unconscionability claims are also gateway issues going to the very existence and validity of the arbitration agreement itself, to be decided by the court. *Hill*, at 53 (“Unconscionability is one such gateway dispute”; quoting *Howsam*, 537 U.S. at 83); *Gandee*, at 603-07; *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302-03 (2004)(“The existence of an unconscionable bargain is a question of law for the courts”); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344 (2004); *Bellevue Drug Co. v. Advance PCS*, 333 F.Supp.2d 318, 22 A.L.R.6th 749 (E.D. Pa. 2004)(unconscionability claims are gateway issues regarding the validity of the arbitration agreement; loser-pays fees and costs provision was unconscionable); *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, No. C 12-05797 SBA, 2013 WL 5539563, at \*3 (N.D.Cal. Oct. 8, 2013)

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<sup>15</sup> Vulcan claims it argued to Judge Benton that Judge Oishi “carefully considered” “**arbitrability**”, not conscionability. If so, then Vulcan must be estopped from arguing to Judge Benton that Judge Oishi had adjudicated unconscionability. Neither court considered the gateway issue of unconscionability. *Harris v. Fortin*, -- Wn. App. --, 333 P.3d 556, 558 (Sept. 8, 2014); Opening Br., at 29, n.20. They did not.

(“Unconscionability is one of the ‘generally applicable contract defenses’ which may invalidate an arbitration agreement”).

**B. Because Judge Oishi’s Order Compelling Arbitration Prejudicially Affected Judge Benton’s Rulings, His Errors Are Properly Within This Appeal.**

Contrary to Vulcan’s claim, Resp. 20, 22, there is no need to separately assign error to Judge Oishi’s order compelling arbitration or to Judge Benton’s denial of Turner’s alternative CR 60 motion for relief from Judge Oishi’s order. These decisions are well within the scope of review here. RAP 2.4(a), (b). A notice of appeal designating the decisions a party wants reviewed “subjects to potential review any related order that ‘prejudicially affected the designated decision and was entered before review was accepted.’” *Clark Cnty. v. Western Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144 (2013)<sup>16</sup>(citing RAP 2.4(b)).<sup>17</sup> Directly on point, our courts have held that if a trial court erroneously compels arbitration, that order prejudicially affects a subsequent order

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<sup>16</sup> (Quoting *In re Dependency of Brown*, 149 Wn.2d 836, 840 n.2 (2003) (dependency order was within the scope of appeal under RAP 2.4(b) because it prejudicially affected a later dispositional order, which “could not have been entered without a finding of dependency.” (Citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 134–35 (1988)).

<sup>17</sup> Under RAP 2.4(b), this Court “will review a trial court order or ruling not designated in the notice ... if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.” An order or ruling “prejudicially affects” the decision designated in the notice if the order appealed from “would not have happened but for the first order”, *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 380 (2002), or the “designated decision would not have occurred in the absence of the undesignated ruling or order.” *Gomez v. Sauerwein*, 172 Wn. App. 370, 376 (2012), *aff’d*, 180 Wn. 2d 610 (2014).

confirming an arbitration award. *Teufel Const. Co. v. Am. Arbitration Ass'n*, 3 Wn. App. 24, 26 (1970) (party may not appeal a nonfinal order compelling arbitration; instead the party will have the opportunity “[a]t the proper time” to challenge arbitrability); *cf. Saleemi v. Doctor's Assocs., Inc.*, 166 Wn. App. 81, 91-92 (2012) (nonfinal orders compelling arbitration are reviewable following arbitration), *aff'd*, 176 Wn.2d 368 (2013).<sup>18</sup>

Judge Benton relied heavily on Judge Oishi’s order compelling arbitration (as Vulcan convinced the court to do) to preclude her from denying Vulcan’s motion to compel arbitration of Turner’s claims, based on *res judicata* and/or collateral estoppel, as well as Judge Oishi’s alleged conclusions on the merits of unconscionability. CP 4029. Her rulings compelling arbitration based on Judge Oishi’s order including multiple erroneous grounds would not have happened without that order. Turner’s appeal brings up for review Judge Oishi’s errors and all of Judge Benton’s rulings based on them.<sup>19</sup>

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<sup>18</sup> Turner’s appeal brings up for review all of Judge Benton’s errors, including her refusal to grant alternative relief under CR 60 (suggested by Vulcan to Turner on March 2, 2012, CP 549) by vacating Judge Oishi’s ruling (though this was not necessary for a nonfinal order in a case voluntarily dismissed without prejudice). Judge Benton’s order compelling arbitration expressly incorporates her denial of Turner’s CR 60 motion, CP 4027, and it prejudicially affected the subsequent order compelling arbitration.

<sup>19</sup> Beyond the notice of appeal, “the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review.” *Clark Cnty.*, at 145. *See also id.* at 144 (same; citing RAP

**C. Judge Benton Erred In Concluding Judge Oishi's Order Had Preclusive Effect Requiring Arbitration Of Turner's Claims.**

**1. Judge Oishi's Order Was Not Final For Purposes Of Issue Or Claim Preclusion.**

With all due respect, it is difficult to see how Judge Benton accepted the argument that an order compelling arbitration and staying further proceedings had preclusive effect when: Vulcan's motion was nondispositive; the court had refused to apply summary judgment standards including the refusal to allow discovery (contrary to law; *see* below); the court had Turner's fully-briefed motion for reconsideration before it; and the court entered an order voluntarily dismissing Turner's claims without prejudice. Yet Vulcan argues, without citation to authority and incorrectly, that a party cannot "moot a Superior Court order compelling arbitration by voluntarily dismissing the case after entry of the order." Resp. 27 n.13. A party certainly can do this.

A voluntary dismissal "is not a final judgment. A voluntary dismissal leaves the parties as if the action had never been brought. ... No substantive issues are resolved, and the plaintiff may refile the suit." *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492 (2009) (affirmed in *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 399 (2014)). Turner's voluntary dismissal left the parties as though

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5.3(a); RAP 10.3(a), (g); RAP 12.1)). Vulcan has fully briefed the errors in Judge Oishi's order, as relied on by Judge Benton for preclusive effect.

Judge Oishi had never granted the motion to compel arbitration. Vulcan cites no authority to the contrary. *See also Russell v. Leslie*, 142 Wash. 60 (1927) (rejecting argument that res judicata applied where court in first suit dismissed action without prejudice).

The U.S. Supreme Court has similarly declared that “dismissal ... without prejudice is a dismissal that does not operat[e] as an adjudication upon the merits ... and thus does not have a *res judicata* effect.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 2456, 110 L.Ed.2d 359 (1990). *See also Wilson v. Bank of Am., N.A.*, No. C12-1532JLR, 2013 WL 275018, at \*8 (W.D. Wash. Jan. 24, 2013);<sup>20</sup> *Nw. Wholesale, Inc. v. PAC Organic Fruit, LLC*, -- Wn. App. --, 334 P.3d 63, 80, 2014 WL 4375614 (Sept. 4, 2014).<sup>21</sup>

Yet Vulcan cites two inapposite and old federal cases for the proposition that “[c]ourts treat prior orders compelling or denying

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<sup>20</sup> *See also* Karl B. Tegland, 14A *Wash. Prac., Civil Procedure* § 35:34 (2d ed.) (“Early voluntary dismissals clearly should not be the basis of collateral estoppel”; citing *Lemon v. Druffel*, 253 F.2d 680 (6th Cir. 1958)).

<sup>21</sup> “‘Res judicata, or claim preclusion, prohibits the relitigation of claims and issues that were litigated, or could have been litigated, in a prior action.’ ... The doctrine is designed to prevent relitigation of **already determined causes** and curtail multiplicity of actions and harassment in the courts. ... For the doctrine to apply, **a prior judgment** must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, *and* (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.” (Bold emphasis added; res judicata did not apply as plaintiffs did not litigate issue in bankruptcy court and subject matter and causes of action were not the same as claims in court). Here, of course, nothing was “already determined” or “final” in *Turner I.*

arbitration as ‘final’ for purposes of claim preclusion”.<sup>22</sup> Both are distinguishable decisions concerning the preclusive effect of a **state court** ruling in a subsequent **federal** action. One predates Section 16 of the FAA (1988),<sup>23</sup> which specifies that an order compelling arbitration and staying proceedings is not final for any purpose. Res judicata would apply, if at all, only when the order is actually final:

[A]n order compelling arbitration ... may not be appealed if the court stays the action pending arbitration. ... [W]e have consistently treated orders compelling arbitration but not explicitly dismissing the underlying claims as unappealable interlocutory orders.

*MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4, 6-8 (9th Cir. 2014);  
*Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019, 1021-23 (9th Cir. 2014).

Similarly, in Washington, an order compelling arbitration is not final for any purpose, including preclusion of a new case that the employer wants to arbitrate: “It has been definitely settled by the Supreme Court of

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<sup>22</sup> Resp. 24.

<sup>23</sup> *Towers, Perrin, Forster & Crosby, Inc. v. Brown*, 732 F.2d 345, 348-49 (3d Cir. 1984). In that completely inapposite case, the federal court rejected the defendant employer’s attempt to compel arbitration **in federal court after both the state trial and appellate courts had held the dispute was not arbitrable** based on a state statute barring arbitration of disputes involving employee compensation. Nothing in *Towers* transfers over to this case or to Washington law. Whether motions to compel arbitration under the Washington UAA are “special proceedings” makes no difference; Vulcan does not demonstrate how such a designation would render Judge Oishi’s order compelling arbitration final under state or federal law. In the other case cited by Vulcan, *Southeast Res. Recovery Facility Auth. v. Montenay Int’l Corp.*, 973 F.2d 711, 713 (9<sup>th</sup> Cir. 1992), the court held “a state order compelling arbitration is given preclusive effect in federal court” under California law. That is not the situation here.

this state that an order compelling arbitration is not final”. *Teufel*, at 25-26 (citing *All-Rite Contracting Co. v. Omev*, 27 Wn.2d 898, 901 (1947)); *Wooh v. Home Ins. Co.*, 84 Wn. App. 781, 783 (1997) (“an order compelling arbitration is not a final order”).

The non-finality of Judge Oishi’s order is reinforced by his error in refusing to apply summary judgment standards to the motion, viewing the evidence and inferences in the light most favorable to Turner. CP 4033. A motion to compel arbitration is decided according to the standards for summary judgment under Rule 56. “If there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury.” *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1141 (9th Cir.1991) (repeatedly cited by Vulcan to Judges Oishi and Benton, e.g., CP 70, 88-90, 116). “Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement.” *Id.* at 1141; 9 U.S.C. § 4.<sup>24</sup> The orders improperly compelling arbitration denied Turner her right to the benefit of summary

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<sup>24</sup> *Stirrup v. Educ. Mgmt. LLC*, No. CV-13-01063-TUC-CRP, 2014 WL 4655438, at \*2-3 (D. Ariz. Sept. 17, 2014); *Bettencourt v. Brookdale Senior Living Communities, Inc.*, No. 09-CV-1200-BR, 2010 WL 274331, at \*2 (D.Or. Jan. 14, 2010) (when “there are unresolved issues of fact as to the formation of the arbitration agreement, the court must ‘proceed summarily’ to a jury trial on the merits. 9 U.S.C. § 4”; citing *Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962 (9th Cir.2007).).

judgment standards which would have led to trial on whether she ever agreed to Vulcan's arbitration clause.<sup>25</sup>

**2. Judge Oishi's Order Did Not Collaterally Estop Turner's Challenges To The Arbitration Clause.**

Colliver and Macdonald similarly contend Judge Benton properly concluded issue preclusion (collateral estoppel) barred Turner from bringing her previous and new claims in court, because Judge Oishi's order compelling arbitration was a final decision litigating and deciding the same issues in *Turner II*. As noted, not only was Judge Oishi's order nonfinal, but no issue in *Turner I* was ever litigated and decided because the voluntary dismissal without prejudice returned the parties to their previous positions. Application of issue preclusion certainly did work an injustice in that Turner was forced into arbitration without the opportunity for discovery and a proper hearing applying summary judgment principles, where no court decided any gateway issues of unconscionability.

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<sup>25</sup> While Vulcan focuses on finality as the only element at issue, Resp. 24, *Turner II* added five new claims, including wage and age discrimination. CP 182-85; cf. CP 160-62.

**D. Had The Court Properly Addressed The Merits Of Unconscionability, It Would Have Necessarily Concluded The Arbitration Agreement Is Procedurally And Substantively Unconscionable.**

**1. As A Gateway Matter, The Court Erred In Failing To Invalidate The GBA As Procedurally Unconscionable.**

*Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 303-04 (2004)

defines procedural unconscionability as “the lack of meaningful choice, considering all the circumstances surrounding the transaction”. Those circumstances include: the manner in which the contract was entered, whether the employee had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print. *Id.* These three factors should “not be applied mechanically without regard to whether in truth a meaningful choice existed.” *Id.* at 303 (internal quotation marks omitted). *See also, e.g., Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 266-27 (2013);<sup>26</sup> *Gorden v. Lloyd Ward & Assocs.*, 180 Wn. App. 552, 563-64 (2014); *Elite Logistics Corp. v. Hanjin Shipping Co.*, No. 12-56238, 2014 WL 4654383, at \*1 (9th Cir. Sept. 19, 2014).<sup>27</sup> Here, Turner raised questions of fact about the circumstances showing procedural unconscionability, even

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<sup>26</sup> (Applying similar California law to find arbitration agreement procedurally unconscionable; “[t]he procedural element concerns the manner in which the contract was negotiated, focusing on oppression or surprise”).

<sup>27</sup> (Invalidating arbitration agreement as procedurally unconscionable: “Without a meaningful opportunity for Elite to negotiate, and with Elite faced with a ‘take it or leave it’ proposition, the district court did not err in concluding that the contract was procedurally unconscionable under California law”; also substantively unconscionable).

without proper discovery. The court erred in ruling the GBA was procedurally conscionable.

Vulcan claims the only allegation of procedural unconscionability that Judge Benton denied is Vulcan's failure to provide Turner with the AAA rules, leaving the other allegations for the arbitrator. As discussed above, all unconscionability claims were for the court, not the arbitrator. Moreover, Judge Benton's order granting the motion to compel is not limited to any particular allegation, but broadly concluded that Vulcan's motion to dismiss was granted on the alternative "basis that the parties' written agreement is not procedurally or substantively unconscionable or otherwise unenforceable[.]" CP 4029.

Failing to provide an employee with the AAA arbitration rules when requiring her to agree to arbitration is a well-known example of procedural unconscionability. *E.g., Brown*, at 267 ("the arbitration agreement contains procedural surprise due to its lack of clarity regarding which set of AAA rules would govern the arbitration"; "procedural unconscionability can be present where rules are referenced in an arbitration agreement but not attached"); *Trivedi v. Curexo Technology Corp.*, 189 Cal.App.4th 387, 393, 116 Cal.Rptr.3d 804 (2010)("Numerous cases have held that the failure to provide a copy of the arbitration rules to

which the employee would be bound, supported a finding of procedural unconscionability.”)

The GBA refers only to “applicable AAA rules”. Accordingly, Vulcan’s failure to provide Turner with the rules renders the arbitration agreement procedurally unconscionable and void. *Gorden*, at 564. *See also Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692, 693-94 (9th Cir. 2013).<sup>28</sup>

As Vulcan points out, Turner did in fact argue below that the GBA lacked consideration. *E.g.*, CP 76, 100-01. Since Judge Oishi’s errors are within the scope of her appeal, she did not waive this argument. Nor is the claim frivolous because Vulcan has not demonstrated the \$25,000 payment was for anything other than Turner’s release. *See Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834 (2004). On the remaining merits of procedural unconscionability, Vulcan disputes Turner’s evidence, admitting that genuine issues of material fact exist as to whether the agreement was unconscionable (*e.g.*, pitting Macdonald’s testimony against Leodler’s, though it is undisputed that the turnaround time Vulcan imposed for signing the GBA was “urgent” and short). At a minimum, there are questions of fact as to procedural unconscionability, and the

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<sup>28</sup> (“Whether an arbitration agreement is procedurally unconscionable depends on ‘the manner in which the contract was negotiated and the circumstances of the parties at that time.’ ... Elemental to this inquiry is whether the agreement “involves oppression or surprise.”)

court should have summarily sent Turner's claims about the agreement to a jury trial. 9 U.S.C. § 4. Vulcan never gave Turner a meaningful choice whether or not to agree to arbitration. CP 3212-16. Vulcan certainly did not provide a choice about paying Vulcan's attorney fees in arbitration, hidden in the "Miscellaneous" section of the EIPA.

**2. As A Gateway Matter, The Court Erred In Failing To Invalidate The GBA As Permeated By Substantively Unconscionable Terms.**

The confidentiality, loser-pays, and unilateral injunctive relief provisions on the GBA render it void for substantive unconscionability, and severing any of them would not save the agreement. *Hill*, at 55-58; *Gandee*, at 604-08; Opening Br., at 32, 36.

**(a) Confidentiality.** Vulcan asserts its confidentiality provision in the EIPA, as applied to the Executive Protection team's **work** somehow immunizes it from the prohibition for the same confidentiality clause in **arbitration**, under *Zuver*, at 314-15, *McKee v. AT&T Corp.*, 164 Wn.2d 372, 398-99 (2008), and other cases. First, the challenge was to the confidentiality provisions pervading the **GBA**. In any event, Vulcan cites no support for this fabricated distinction based on the **type** of work an employee does. Such an interpretation would eviscerate *Zuver*'s holding.<sup>29</sup>

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<sup>29</sup> "As written, the provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee's confidence in the fairness and honesty of

Vulcan used the GBA's confidentiality provisions to make it impossible for Turner to obtain discovery on the unconscionability of the arbitration agreement or any of her claims, gagging Turner from talking with other employees and vice versa. The court's error in rejecting Turner's substantive unconscionability claims establishes prejudice.

**(b) Loser Pays.** Contrary to Vulcan's misrepresentation of the record, Turner did not waive the argument that the fee-shifting provision is unconscionable, because Judge Heller himself ruled on the issue, concluding the loser-pays provision was substantively unconscionable. CP 3595, App. G (citing *Walters*, 151 Wn. App. at 324-25; *Gandee*, 176 Wn.2d at 606). See also *Adler*, at 354-55, *Brown*, at 274-75. *LaCoursiere v. Camwest Dev., Inc.*, -- Wn.2d --, No. 88298-3, 2014 WL 5393866 (Wash. Oct. 23, 2014) has since affirmed the same principle.

In holding the loser-pays clause unconscionable, Judge Heller **vacated** the arbitrator's illegal "restricted application" to allegedly nonstatutory claims on which Vulcan relies to argue the provision is conscionable. Resp. 31 (citing arbitrator's Dec. 2012 interim award). Vulcan also ignores that Turner was not present during the arbitration by the time Vulcan suddenly came up with the claim for fees under the EIPA.

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the arbitration process and thus, potentially discourages that employee from pursuing a valid discrimination claim. Therefore, we hold that this confidentiality provision is substantively unconscionable." *Id.* at 315.

*McKee* similarly struck down an arbitration agreement in part because of a one-sided attorney fee provision in a clause **outside** the arbitration provision. *Id.* at 400.

**(c) Unilateral Emergency Injunctive Relief.** “[I]njunctive relief clauses typically present a high degree of substantive unconscionability. Injunctive relief clauses, which may appear bilateral on their face, have the practical effect of being invoked only, or far more often, by the employer.” *Marquez v. Living*, No. 13-CV-05320-RS, 2014 WL 1379645, at \*4 (N.D. Cal. Apr. 8, 2014) (citing, *e.g.*, *Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387, 393, 116 Cal. Rptr. 3d 804 (2010)).

**E. Turner Suffered Manifest Error And Did Not Knowingly Waive Her Constitutional Right To A Jury Trial.**

Vulcan fails to address the fact that the court in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 361, 364 (2004) remanded for resolution of the parties’ factual dispute whether the employee in that case knowingly waived his right to a jury trial in an employment arbitration agreement.<sup>30</sup> More recently, in *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 99 A.3d 306 (2014), the court invalidated an arbitration clause in a debt

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<sup>30</sup> Incredibly, Vulcan contends Turner did not claim involuntary waiver in *Turner I* because she used the phrase “**judicial forum**” at CP 79 instead of “jury trial.” The New Jersey Supreme Court in *Atalese* used the same phrase as Turner, holding, “because arbitration involves a waiver of **the right to pursue a case in a judicial forum**, ‘courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.’” 99 A.3d at 313 (emphasis added).

adjustment contract, relying on employment as well as consumer arbitration cases: “Nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights.” *Id.* at 315. The court noted, “an average member of the public may not know—without some explanatory comment – that arbitration is a substitute for the right to have one’s claim adjudicated in a court of law.” *Id.* at 313. “[T]he clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute”; otherwise the element of mutual assent is not present, and the waiver is ineffective. *Id.* at 315-16.

In the employment setting, we have stated that we would “not assume that employees intend to waive [their rights under the Law Against Discrimination] unless their agreements so provide in unambiguous terms.” ... [A]lthough a waiver-of-rights provision need not “list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights,” employees should at least know that they have “agree[d] to arbitrate all statutory claims arising out of the employment relationship or its termination.”... Whatever words compose an arbitration agreement, they must be clear and unambiguous that [an employee or] consumer is choosing to arbitrate disputes rather than have them resolved in a court of law.

*Id.* at 316.

[W]hen a contract contains a waiver of rights—whether in an arbitration or other clause—the waiver “must be clearly and unmistakably established.” ... Thus, a “clause depriving a citizen of access to the courts should clearly state its purpose.”

... “[T]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.”

... [W]ithout difficulty and in different ways, the point can be made that by choosing arbitration one gives up the “time-honored right to sue.”

*Id.* at 314-315. “[T]he parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum.” *Id.* at 315. *See also Dispenziere v. Kushner Companies*, -- A.3d --, No. A-3022-13T4, 2014 WL 6490183, at \*5 (N.J. Super. Ct. App. Div. Nov. 21, 2014) (following *Atalese*; arbitration provision was “devoid of any language that would inform ... plaintiffs that they were waiving their right to seek relief in a court of law. ... [T]his lack of notice [was] fatal to defendants' efforts to compel plaintiffs to arbitrate their claims.”); *State v. Frawley*, -- Wn.2d --, 334 P.3d 1022, 1027-28 (2014) (courts “indulge every reasonable presumption against waiver of fundamental rights”, which must be made knowingly, voluntarily, and intelligently). Nothing in the GBA notified Turner that she was giving up her right to a jury trial in a public court of law, with severely curtailed discovery under Vulcan’s strict confidentiality provision, at exorbitant cost to her. Turner did not knowingly and voluntarily waive her constitutional right to a jury trial.

**F. The Error In Segregating Fees To Allow Any Award To Employer Vulcan Is Properly Preserved And Fully Presented By The Parties.**

The superior court erred in remanding attorney fees to the arbitrator for ostensible segregation to allegedly “nonstatutory” claims when Vulcan conceded that all Turner’s claims arose from a common core of facts.<sup>31</sup> The court further erred in confirming the arbitrator’s remanded fee award in violation of public policy for fees that could not properly be segregated.

**1. The Record Establishes No Waiver Of Errors In Remanding And Segregating Attorney Fees.**

Vulcan does not allege waiver of the issue whether the arbitrator’s fee award on remand violated public policy as an issue on appeal, and has argued the merits of its defense that the remanded fee award should be upheld. Accordingly, the Court need not address waiver. In any event, there is no waiver. Turner opposed Vulcan’s request at every step in this proceeding, beginning with her opposition to the summary judgment motions for which the arbitrator illegally awarded attorney fees. CP 3827-

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<sup>31</sup> Vulcan argued to Judge Benton that all allegations in the arbitration arose out of “a common nucleus of underlying facts, allegations, and claims”. CP 2002. Respondents should be judicially estopped from switching positions on this issue for purposes of segregating fees. *Harris v. Fortin*, -- Wn. App. --, 333 P.3d 556, 558 (Sept. 8, 2014). Colliver and Macdonald agree, in their Statement of the Case, that the claims were “indisputably employment-related ... CP 62-72.” Colliver/Macdonald Br., 5. They also argue “[t]here was no dispute” that Turner’s claims in *Turner II* arose from the “very same facts and circumstances” as in *Turner I*, that is, “her nine-month employment at Vulcan and alleged misconduct by Vulcan and its agents during that tenure.” C/M Br., 17-18.

29. Turner objected when Vulcan improperly placed its request for remand in its Notice of Presentation of Order and Memorandum in Support, CP 4539-44, rather than in a motion for remand, CP 3434-35. The parties consistently framed and argued the issue as whether Vulcan was entitled to a **segregation** of fees for nonstatutory claims concededly related to the statutory ones. Indeed, Vulcan continues to rely on inapposite segregation cases on this appeal.<sup>32</sup>

In requesting remand, Vulcan cited three cases for segregating “recoverable” from “unrecoverable” fees: *Boguch v. Landover Corp.*, 153 Wn. App. 595 (2009); *Pearson v. Schuach*, 52 Wn. App. 716, 723 (1988); and *Moses v. Phelps Dodge Corp.*, 826 F. Supp. 1234 (D. Ariz. 1993). As Turner noted, these cases have no bearing on the present Washington statutory employment and wage lawsuit. CP 4543. *Boguch* and *Pearson* involved segregation of contract versus tort claims, not statutory employment or wage claims. *Moses* relies on 1993 Arizona law, which, unlike Washington or federal civil rights law on which our law is based, permits fees to defendants as well as plaintiffs.<sup>33</sup>

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<sup>32</sup> For waiver, Vulcan cites *Karlberg v. Otten*, 167 Wn. App. 522, 531-32 (2012), where plaintiff waived his adverse possession claim by failing to present it to the trial court. In contrast, here, Turner opposed Vulcan’s Notice of Presentation of Order requesting remand, opposed the fee request on remand, and opposed the remanded fees before Judge Heller in her briefing on Vulcan’s motion to confirm and Turner’s motion for attorney fees, where she argued against segregation.

<sup>33</sup> “Arizona courts construe their fee-shifting statutes ... as a permissive grant of authority that affords trial courts broad discretion... Under the Arizona statute, both plaintiffs and

Turner then responded that Vulcan's request violated motion practice rules; remand would violate AAA rules; the common law doctrine of *functus officio* bars remand once an arbitrator has rendered a final award; the requested fees were the result of Vulcan's spurious and unnecessary strategy to drive up costs; and all of Turner's claims, "statutory and non, were based on a 'common core' of facts", citing *Pannell v. Food Servs. of Am.*, 161 Wn. App. 418 (1991); *Hume v. Am. Disposal Co.*, 124 Wn.2d 656 (1994). CP 3436-38. Vulcan agreed with the latter point. CP 2002 (all allegations in the arbitration arose out of "a common nucleus of underlying facts, allegations, and claims").<sup>34</sup>

On remand before the arbitrator, Turner again pointed out the statutory and "nonstatutory" claims arose from a common core of facts, citing *Pannell* and *Hume*, as well as *MacDonald v. Korum Ford*, 80 Wn. App. 877 (1996) (court must consider whether the requested fees could have been avoided or were self-imposed). She cited to her specific objection at the time of the summary judgment motions in arbitration demonstrating they were unnecessary. CP 3827-29.

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defendants may qualify as the prevailing party. ... [citing *Moses*]." Jami Rhoades Antonisse, *Attorney Fees: Attorney Fees, Prevailing Parties, and Judicial Discretion in Oklahoma Practice: How It Is, How It Should Be*, 57 Okla. L. Rev. 947, 969 (2004).

<sup>34</sup> See also CP 4030 (Judge Benton considered all claims related to Turner's employment).

In responding to the Motion for Confirmation of Award, Turner argued vigorously against segregation of fees because the claims arose from a common core of facts. CP 3640-48. Her proposed order provided for a grant of attorney fees only to Turner.<sup>35</sup> The court had considered the issues and decided to have the arbitrator decide whether to segregate fees for work on summary judgment motions. Turner's Assignment of Error 2 and Issue 2 make clear that she appeals (1) the superior court's improper remand when the court had properly vacated all fees, as well as (2) the erroneous confirmation of the remanded fee award to Vulcan in violation of public policy. The court erred in both remanding and confirming the arbitration fee award, allowing this violation of public policy based on a misapplication of segregation principles.

**2. Turner's Appeal Encompasses Both The Erroneous Remand And Confirmation Of Improperly Segregated Fees To "Nonstatutory" Claims.**

Turner's notice of appeal listing the Order Confirming Final Arbitration Award (CP 3998) brought up for review the superior court's erroneous remand of fees (CP 3501). *Clark Cnty. v. Western Washington*

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<sup>35</sup> It is also important to note again, and Vulcan does not dispute, that it did not invoke the EIPA's attorney fee provision buried within the Section labelled "Miscellaneous" until after the proceedings to compel arbitration. In March 2012, before Judge Benton, Vulcan requested fees under CR 11 and RCW 4.84.185, never mentioning the EIPA fee provision. CP 262-64. Turner had no prior notice whatsoever—not when she signed the GBA in July 2011, not when Vulcan invoked the arbitration clause Judge Oishi, not when Vulcan brought its summary judgment motions, and not even during the arbitration -- that Vulcan would be requesting attorney fees in addition to opposing paying for arbitration costs and fees under its employer-promulgated arbitration agreement.

*Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144 (2013); RAP 2.4(b). The Order Confirming Final Arbitration Award encompassed and would not have happened without the erroneous remand.<sup>36</sup> Vulcan fully defends the remanded fee award in its brief. Given the “assignments of error and substantive argumentation” extensively briefing the matter, *Clark Cy.*, at 144-45, and the Court’s “wide discretion in determining which issues must be addressed in order to properly decide a case on appeal”, *id.* at 146-47,<sup>37</sup> the issue whether the court improperly permitted and confirmed segregation of fees in violation of public policy is properly before this Court. The Court will consider issues that are “intertwined with”<sup>38</sup> or even “arguably related” to questions properly before it,<sup>39</sup> particularly given extensive briefing from the parties. *E.g.*, *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 276 (2004) (issue fully briefed by both sides on appeal; promote justice, facilitate decision on merits).<sup>40</sup>

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<sup>36</sup> See cases in notes 18-19, *supra*.

<sup>37</sup> (Citing, *e.g.*, RAP 12.1(b); RAP 7.3; RAP 1.2).

<sup>38</sup> *In re Johnson-Skay*, 81 Wn. App. 202, 204 (1996).

<sup>39</sup> *Mavis v. King Cnty. Pub. Hosp. No. 2*, 159 Wn. App. 639, 651 (2011) (issues “were certainly before the trial court”).

<sup>40</sup> See also, *e.g.*, *Home Builders Ass'n of Kitsap Cnty. v. City of Bainbridge Island*, 137 Wn. App. 338, 345-46 (2007)(where City fully briefed issues, “declining to address [them]... would not serve to encourage the efficient use of judicial resources”); *In re Dependency of MSR*, 174 Wn.2d 1, 11 234 (2012)(extensive briefing). Even when there is a technical violation of procedural rules, the Court will consider an issue on appeal when the nature of the challenge has been made clear without prejudice to the opposing party. *Clark Cnty.*, at 144; *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 658 n.15 (2013) (no bar to review, justice served, and nature of challenge is perfectly clear).

Moreover, “[w]here, as here, the issue was clearly before the trial court, and its prior rulings demonstrated that a motion [challenging] the order would not have been granted, a party cannot be reasonably held to have waived the right to assert the error on appeal merely by declining to engage in the useless act of repeating their arguments”. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99 (1997) (citing *East Gig Harbor Improvement Ass’n v. Pierce Cnty.*, 106 Wn.2d 707, 709-10 n.1 (1986) (“As long as the trial court had sufficient notice of the issue to know what legal precedent was pertinent this court will not refuse to consider the issue.”)). Judge Heller definitively ruled that whether Vulcan was entitled to fees for its summary judgment motions was for the arbitrator on remand. CP 3484. The court had complete notice of the issue and legal precedent. It would have been a futile act to repeat the arguments.

**G. Reviewed De Novo, The Remanded And Confirmed Award Of Segregated Fees Is Void As Against Public Policy.**

**1. Review Is De Novo.**

The Court reviews a decision to confirm an arbitration award de novo. *E.g., Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1284 (9<sup>th</sup> Cir. 2009); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 330 (3d Cir. 2014); *ACF Property Management, Inc. v. Chaussee*, 69 Wn. App. 913, 920-21 (1993); *Equity Group, Inc. v. Hidden*, 88 Wn. App. 148, 153-54 (1997). If the arbitrator had no authority to render the remanded

fee award or it is void in any other way, then the court had no jurisdiction to enter judgment on the unauthorized award. *ACF Property Mgmt.*, at 920-21. Here, both Judge Heller's remand and confirmation of the award are void because both allowed a segregation of fees in violation of public policy. The court did not have jurisdiction to remand fees nor to confirm the unauthorized award.

Review of a trial court's decision whether an arbitrator's fee award violates public policy is also de novo. *International Union of Operating Engineers v. Port of Seattle*, 176 Wn.2d 712, 721 (2013). See also *Ahdout v. Hekmatjah*, 213 Cal.App.4th 21, 33, 152 Cal. Rptr. 3d 199, 210 (2013)(arbitrator's finding subject to de novo review because it implicated an explicit legislative expression of public policy); *Burr Rd. Operating Co. II, LLC v. New England Health Care Employees Union, Dist. 1199*, 142 Conn. App. 213, 223-24, 70 A.3d 42 (2013) (de novo review of claim that an arbitral award was contrary to public policy: "Where a party challenges an award on the ground that it violates public policy, de novo review is in order if the challenge has a legitimate, colorable basis"); *Chrysler Motors Corp. v. International Union, Allied Indus. Workers of Am., AFL-CIO*, 959 F.2d 685, 687 (7<sup>th</sup> Cir. 1992)("The public policy doctrine allows this court to decide de novo whether [the award at issue] violates public policy.").

The doctrine that courts may refuse to enforce arbitration awards that violate public policy “derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act.” *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 42, 108 S.Ct. 364, 373, 98 L.Ed.2d 286, 301 (1987). “Typically, the public policy exception is implicated when enforcement of the award compels one of the parties to take action which directly conflicts with public policy.” *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993). It is a “now-settled rule that a court need not, in fact cannot, enforce an award which violates public policy.” *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1209 (9th Cir. 1989) (en banc).

## **2. Turner Has Shown Prejudice.**

“Prejudice” here—in the context of Turner’s challenge to the orders compelling arbitration after arbitration has been completed—means she must show she “suffered some harm.” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 380-81 (2013). Vulcan contends Turner must demonstrate prejudice not in the arbitrator’s “substantive decisions”, but rather in the “effect” of the court’s order compelling arbitration (giving examples of denying defenses or eliminating the contract’s protections). This argument incorrectly assumes that the court addressed the gateway

issue whether there was a valid contract between Turner and Vulcan and whether it was unconscionable. But Judges Oishi and Benton did not resolve those issues. The orders compelling arbitration prejudiced Turner by denying her the right to have a court consider her challenges to the very existence of the arbitration agreement. Instead, Vulcan pursued Turner through arbitration and then came up with a previously-unannounced clause to subject her to an outrageous fee award in its favor. To overcome this injustice, Turner had to move to vacate the award against the odds, under a narrow standard of review. The orders compelling arbitration caused Turner clear harm.

Colliver and Macdonald contend the attorney fee award is insufficient to show prejudice. They ignore the fact that Turner was ultimately forced to withdraw by Vulcan's relentless pressure in court and arbitration, together with mounting costs of arbitration. Opening Br., 11, 17-18 (\$30,450 in fees billed by AAA as of April 2012).<sup>41</sup> This was followed by Vulcan's pursuit of its own claims against her resulting in a judgment on one small claim plus a "shocking" amount of fees.<sup>42</sup> Turner

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<sup>41</sup> Colliver and Macdonald pretend that the AAA costs were not a factor because "Vulcan ultimately paid" for them, but they ignore that Vulcan steadfastly refused to pay arbitration costs until late in 2012, instead maintaining that the parties should share costs because the plan was not employer-promulgated. CP 2461 (Vulcan agreeing to pay AAA costs; Dec. 2012).

<sup>42</sup> Colliver and Macdonald also deny that Turner requested discovery in *Turner I*. In her response to Vulcan's motion to compel arbitration, she specifically asked that the motion be treated as dispositive under CR 56, CP 79, and noted throughout her response the

has shown egregious prejudice and harm resulting from the erroneous orders compelling her to arbitrate her claims.

**3. The Segregation of Fees Violated Public Policy.**

**a. The Law On Segregation Of Fees Does Not Permit The Arbitrator's Carve-Out.**

Vulcan's segregation argument was and is essentially an attempt to circumvent Washington's prohibition against fee-shifting when employees bring claims to vindicate their statutory rights. The Washington Supreme Court decisively confirmed the public policy prohibition against fees to a prevailing defendant in *LaCoursiere*. In *LaCoursiere*, the Court reversed an award of attorney fees to the employer, even though the employee's claim under the Wage Rebate Act (RCW Chapter 49.52) was dismissed, because under RCW 49.52.070, "reasonable attorney fees and costs are available only to prevailing employees." *Id.* at \*1. The Court relied on *Walters v. AAA Waterproofing, Inc.*, 151 Wn. App. 316, 321-22 (2009) and *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 274-75 (2013), holding:

We have previously held that mandatory attorney fee shifting provisions in employment contracts are unconscionable where the legislature authorizes only prevailing employees to collect attorney fees. *See Brown ...*, [at] 274-75 (2013) (holding that a mandatory fee shifting provision in an employment agreement is

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many disputed facts that the court would need to view in her favor, including that an arbitration agreement must have sufficient discovery to allow her to vindicate her statutory rights.

unconscionable under a similar statute because it was “a significant deterrent to employees contemplating initiating an action to vindicate their rights”); *see also Walters*, 151 Wn. App. at 325 (holding that in the context of the WRA, “a reciprocal attorney fees provision is unconscionable”).

*LaCoursiere*, at \*6. Justice Gonzalez, concurring, agreed that “[i]t would frustrate the broad remedial purpose of the act to allow an employer to override the clear statutory system by contract.” *Id.* at \*7.<sup>43</sup> Vulcan is not immune from this prohibition.

Judge Heller noted that “Vulcan acknowledged at oral argument, there are no cases recognizing an exception to fee shifting principles if an employer prevails on procedural, as opposed to substantive, grounds.” CP 3596. Vulcan’s still-unsupported contention is entirely the same as below: that the court should segregate – or as Judge Heller phrased it, “carve out” – pieces of the proceedings in Turner’s statutory employment and wage claims in order to award a defendant-employer fees on matters where it claims to have “prevailed”.<sup>44</sup> The arbitrator created an exception to the

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<sup>43</sup> Similarly, in *In re Wal-Mart Wage and Hour Employment Practices Litigation*, 737 F.3d 1262 (9<sup>th</sup> Cir. 2013), the Ninth Circuit held that the parties could not waive or eliminate by contract statutory grounds for vacating arbitration. Accordingly, the nonappealability clause eliminating all federal court review of arbitration awards in the parties’ arbitration agreement was not enforceable. CP 2455-58.

<sup>44</sup> In rejecting Vulcan’s claim to attorney fees based on segregation for a purportedly “procedural” defense, Judge Heller further explained, “Thus, if an employee brought a discrimination claim that was subsequently dismissed on statute of limitation grounds, the prevailing employer would not be entitled to attorneys’ fees. Yet Vulcan argues it is entitled to fees because in *Turner II* it prevailed based on a different procedural defense, *i.e.*, that the litigation should occur in a different forum.” CP 3596. Vulcan’s lack of any authority on this issue is confirmed by Vulcan’s repeated citation of *Boguch v. Landover Corp.*, 153 Wn. App. 595 (2009), a case about segregation, not statutory employment or

fee-shifting prohibition, contrary to Washington and federal law, granting fees for Vulcan's work on two partial summary judgment motions involving claims arising from Turner's employment with Vulcan. CP 3594-95.

As the arbitrator here recognized, the only time an employer might recover fees in a statutory employment or wage case would be in the "exceptional"<sup>45</sup> situation when the employee's claims are frivolous, unreasonable, or without foundation, which Turner's claims were not. *E.g.*, CP 3995-96 (citing *Walters*, at 323).<sup>46</sup> The WLAD is similar to the Federal Civil Rights Act of 1964 (Title VII), and Washington courts look to federal cases when construing the WLAD. *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 491-92 (2014). In fact, "[w]here this court has departed from federal antidiscrimination statute precedent, ... it has almost

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wage claims or arbitration in that context. Vulcan still has no cases supporting its position, because there are none. Therefore, as discussed below, the cross-appeal is frivolous.

<sup>45</sup> A court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case only in exceptional circumstances, on a finding that plaintiff's action was frivolous, unreasonable, or without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). A "defendant is *not* entitled to an award of fees on the same basis as a prevailing plaintiff." *Id.* at 418-19 (emphasis in original). "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* at 422.

<sup>46</sup> Moreover, "because fee awards are at bottom an equitable matter, ... courts should not hesitate to take the relative wealth of the parties into account." *Thomas v. Bergdorf Goodman, Inc.*, 03 CIV. 3066 (SAS), 2004 WL 2979960 (S.D.N.Y. Dec. 22, 2004) (emphasis added) (while plaintiff was unable to ultimately prove race-based animus, court would not assess fees against a "woman of modest means, in favor of Bergdorf Goodman, a multi-million dollar department store"; quoting *Faraci v. Hickey-Freeman Co., Inc.*, 607 F.2d 1025, 1028 (2d Cir. 1979)).

always ruled that the WLAD provides greater employee protections than its federal counterparts do.” *Id.* at 491. In federal civil rights cases (including employment discrimination), courts vigorously disapprove of segregating fees between “frivolous” and “nonfrivolous” claims. *Quiros v. Hernandez Colon*, 800 F.2d 1, 2 (1<sup>st</sup> Cir. 1986) (court “reluctant to adopt a rule requiring a court to engage in such fine tuning that it must award fees as to an insubstantial claim even though another claim was more substantial and perhaps even prevailed”); *Maag v. Wessler*, 993 F.2d 718, 720 (9<sup>th</sup> Cir. 1993) (court properly denied attorney fees to prevailing defendants even though it ruled for defendant on an immunity issue);<sup>47</sup> *Marquart v. Lodge 837, Intern. Ass’n of Machinists and Aerospace Workers*, 26 F.3d 842, 850-51 (8<sup>th</sup> Cir. 1994) (in employment retaliation claim, when plaintiff voluntarily dismissed with prejudice before a judicial decision on the merits, apparently as a legitimate litigation strategy, court reversed award of fees to defendant as prevailing party, stating the “contours of what constitutes a prevailing plaintiff for purposes of fee-shifting ... are meant to be extreme because ... a prevailing plaintiff is entitled to attorney fees except under very special circumstances.”). Summary judgment motions to dismiss related claims arising out of a

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<sup>47</sup> “[T]he fact that a plaintiff may ultimately lose his [civil rights] case is not in itself a sufficient justification for the assessment of fees.” *Maag*, 993 F.2d at 721 (quoting *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980) (per curiam)).

common core of facts (and efforts to compel arbitration, *see* below) simply do not qualify an employer for fee-shifting. None of Vulcan's cases support such a carve out.

The only case cited by Vulcan on appeal for its position on segregation, *Hume v. American Disposal Co.*, 124 Wn.2d 656, 672 (1994),<sup>48</sup> stands for the opposite of its argument that a prevailing employer is entitled to fees in an employment or wage and hour case where the claimed "nonstatutory" claims arise from a common core of facts. "Where ... the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees." *Hume*, at 673 (citing *Pannell v. Food Servs. Of Am.*, 61 Wn. App. 418, 447 (1991)). Contrary to Vulcan's implication, in addressing segregation in *Hume*, the court discussed which of the **prevailing plaintiff-employees'** (not defendants') claims were successful for a fee award. Vulcan has never cited any Washington case allowing fees to a prevailing employer in a statutory employment or wage case where the claims are based on a common nucleus of facts, because there are none.

Washington law is replete with the axiom that the court may not segregate fees on related claims, particularly when they arise out of a

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<sup>48</sup> Resp. 44.

statutory scheme prohibiting fees to a prevailing defendant employer: “If the court finds that claims are so related that segregation is not reasonable, then it need not segregate the attorney fees.” *Dice v. City of Montesano*, 131 Wn. App. 675, 690 (2006) (citing *Hume*, at 672). A “court is not required to artificially segregate time ... where the claims all relate to the same fact pattern, but allege different bases for recovery.” *Ethridge v. Hwang*, 105 Wn. App. 447, 461 (2001) (citing *Blair v. Wash. State. Univ.*, 108 Wn.2d 558, 572 (1987)).

[I]f “the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.” *Hume* ... , [at] 673.... In this case, all of Plaintiff’s claims were interrelated to a degree that no reasonable segregation should be made.

*Castellano v. Charter Commc'ns, LLC*, C12-5845 RJB, 2014 WL 1569242 (W.D. Wash. Apr. 17, 2014) (WLAD). *See also* Opening Br., 45-47.<sup>49</sup>

**b. The Remanded Attorney Fee Award To Employer Vulcan Violates Public Policy.**

The arbitrator’s fee award of \$39,524 on remand violates public policy just as much as the original award which Turner succeeded in vacating, and for the same reasons. Judge Heller erred in remanding the

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<sup>49</sup> Citing *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 352 (2012) (where “ ‘the plaintiff’s claims for relief ... involve a common core of facts or [are] based on related legal theories,” a lawsuit cannot be “viewed as a series of discrete claims” and, thus, the claims should not be segregated in determining an award of fees); *Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 547, 548 n.7 (2007); *Brown*, at 274 (court refused to shift fees to a prevailing defendant though only “some of the underlying claims [e]ll under the Washington Minimum Wage Act”).

fee issue on a purportedly “alternative basis” to the arbitrator, who made no findings that defamation and “validity of the release” arose out of any different facts than the statutory claims. They did not.

The court must vacate an arbitration award if enforcing it would “thwart the purpose” of either the statute's terms or its stated purpose. *Kinder Morgan Bulk Terminals, Inc. v. United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, & Its Local 1*, 9 F. Supp.2d 507, 516 (E.D. Pa. 2014) (citing *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 363-64 (3d Cir. 1993)). There is no basis for an end-run around public policy with fees to a prevailing employer. The risk of having to pay almost \$40,000 in attorney fees to resist an employer's overzealous attempt to punish an employee who had already withdrawn from an arbitration will absolutely deter employees from mounting legitimate challenges. Chilling plaintiffs from bringing an employer to court over its arbitration clause rewards Vulcan's increasingly onerous policy on arbitration, making it nearly impossible for a plaintiff to prevail in that forum. The court's remand and confirmation of the arbitrator's unfounded exception for fees on Vulcan's two unnecessary summary judgment motions creates a dangerous loophole for employers like Vulcan, which the Court should firmly close. *See also Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060,

1069 (8<sup>th</sup> Cir. 2003)(vacation of arbitration award of attorney fees; “Where an arbitration panel cites relevant law, then proceeds to ignore it, it is said to evidence a manifest disregard for the law.”) The arbitrator’s carve-out for segregating fees to supposedly nonstatutory claims and the court’s remand and confirmation of the fee award are unsupported and in fact contradicted by authority, and void as against public policy.

**H. Vulcan’s Cross-Appeal Attempting To Reinstate The Illegal Fee Award Is Frivolous.**

It is Vulcan, not Turner, that seeks to extend the law in a frivolous cross-appeal. Vulcan appeals Judge Heller’s firmly grounded conclusion, based on the clear consensus of Washington courts, that an attorney fee award to a prevailing defendant-employer violates public policy.<sup>50</sup> Following *LaCoursiere* and the precedent it is based on, this Court should affirm Judge Heller’s decision, and Turner should be awarded attorney fees for this baseless cross-appeal.

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<sup>50</sup> Vulcan wrongly claims Judge Heller raised the public policy issue *sua sponte*. Resp. 11. To the contrary, the record shows that Turner argued the public policy issue in her reply. CP 3183-84. Then, at the July 23, 2013 hearing on Turner’s Motion to Vacate, Judge Heller asked Vulcan why public policy would not preclude Vulcan from recovering fees for prevailing on its “arbitration defense” in *Turner II*, and whether Vulcan was aware of any cases supporting its position that a court may award fees to a prevailing defendant-employer for a defense unrelated to the merits of the employment claim. Vulcan was aware of “[n]o cases”. VRP 7-23-13, 30:9-31:10. The Court then requested supplemental briefing on the issue. *Id.* 49:12-50:9 (requesting briefing on the issue raised in Turner’s reply, “if an employer is awarded fees for trying to get a case to arbitration when the case itself, for the most part, raises statutory claims, does that violate the policy in this state not to chill the right of employees to file discrimination claims. ... I’m not sure there is a fine line there” as Vulcan had attempted to make).

Vulcan argues that Judge Heller’s Memorandum Opinion “pointed to *no authority*” for public policy against fee awards for motions to compel arbitration, and that the court erred in “*extend[ing]*” a “judicial practice on a *different* issue—barring fee awards to employers who successfully defend against discrimination and wage claims” to an award for compelling Turner to arbitrate her discrimination and wage claims. Resp., 47. But Vulcan has no authority, then and now.<sup>51</sup>

As it did below, Vulcan attempts to distinguish compelling arbitration as a “procedural” issue distinct from the “merits” of her claims. Resp., 47 & n.29 (arguing “arbitrability” is a “procedural issue wholly separate from the merits.”)<sup>52</sup> Relying on the same “two sentences”<sup>53</sup> of dicta in *Zuver v. Airtouch Communications, Inc.*,<sup>153</sup> Wn.2d 293, 319 (2004) that Judge Heller analyzed, CP 3596, Vulcan fabricates a “new

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<sup>51</sup> The only case other than *Zuver* cited by Vulcan in support of awarding fees to an employer for successfully compelling arbitration is *Perez v. Qwest Corp.* 883 F. Supp. 2d 1095, 1127 (D.N.M. 2012). The parties did not raise, and the court did not address whether an award of fees to the defendant would violate public policy. The court granted attorney fees to the defendant under Colorado law applied to a specific provision allowing fees to a party who successfully stays a court action and/or compels arbitration of claims subject to the arbitration agreement. *Id.* at 1127. Vulcan cited *Perez* to Judge Heller, and he rejected it. CP 3288-89; CP 3417-32.

<sup>52</sup> Here too, Vulcan attempts to have its cake and eat it too, switching from arguing whether Judge Oishi and Judge Benton ruled on procedure or merits. Vulcan argued to Judge Benton that Judge Oishi had in fact ruled on the “merits” of the arbitration agreement’s unconscionability, binding Judge Benton to rule the same way on the merits of unconscionability (though he clearly had not). Afterwards and now, Vulcan contends Judge Benton’s granting of Vulcan’s motion to compel was merely procedural and had nothing to do with the merits of Turner’s claims.

<sup>53</sup> CP 3596 (Mem. Op.: “Vulcan relies primarily on *Zuver* [for its argument that its loser pays provision is not unconscionable] ... The court based this holding on ... two sentences.”).

field of activity”—“arbitrability”—to which it argues Judge Heller imposed a “no-reciprocal fees” mandate. Vulcan continues to argue that *Zuver* “implicitly recognized” a bilateral fee provision is neutral in an employee’s effort to vindicate her statutory rights.

But far from being “dispositive” of Vulcan’s cross-appeal, *Zuver* did not even address public policy or the chilling effect of a fee provision on an employee’s efforts to vindicate her statutory rights. Nor did Judge Heller rule “directly at odds with *Zuver*” on the availability of fees for compelling arbitration. Resp. at 49. n.31. *Zuver* did not “expressly reject” “the same issue”, because the parties did not present or argue the violation of public policy in a loser-pays fees clause in the context of employment or wage claims. The only question the court briefly commented on in *Zuver* was whether a reciprocal loser-pays provision was substantively unconscionable. The court observed simply that it was reciprocal and, in light of the arguments in that case, “does not appear to be so one-sided and harsh as to render it substantively unconscionable.” *Id.* at 319. This is hardly dispositive of the violation of public policy presented by the same loser-pays provision in this case. Judge Heller recognized several reasons *Zuver* is distinguishable:

(1) *Zuver* Did Not Address The Public Policy Violation, But Rather Dealt With The **Speculative** Possibility That The Provision Might Be Unconscionable If The Arbitrator Failed To Award Fee To Plaintiff.

Judge Heller correctly noted, “*Zuver* is not directly on point since it addressed unconscionability as opposed to violations of public policy.” CP 3596-97.<sup>54</sup> Importantly, as *Walters* pointed out, the fee provision in *Zuver* was permissive, using the word “may”, while the clause at issue here is mandatory, using the word “shall.” CP 2362; *Walters*, 151 Wn. App. at 322-25.<sup>55</sup>

(2) *Gandee*<sup>56</sup> Distinguished *Zuver* And Held A Virtually Identical Provision Violates Public Policy.

Because *Zuver* did not address public policy, the two sentences Vulcan relies on were simply dicta, the fee provision was permissive, and the Court in *Gandee* clearly did reject Vulcan’s argument, Judge Heller concluded, “There is a serious question whether the *Zuver* court’s exclusive focus on the bilateral nature of the fee provision continues to represent the current view of the court.” CP 3596. The Memorandum Opinion then explains that in *Gandee*, nine years after *Zuver*, the Washington Supreme Court invalidated a reciprocal loser pays provision

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<sup>54</sup> “However, the two concepts are closely related. ... It is difficult to conceive of a provision that fits within [*Adler*’s] definition of unconscionability that would not also violate public policy.” *Id.* (Mem. Op., 14, n.2).

<sup>55</sup> “*Adler* demonstrates that ... it is not speculative to assume that an arbitrator would apply the provision ... . It uses the word ‘shall’ and it is not ambiguous.” *Id.* at 324.

<sup>56</sup> *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 605-06 (2013).

in a debt adjustment contract “virtually identical” to Vulcan’s<sup>57</sup> because it “serve[d] to benefit only [the defendant corporation] and, contrary to the legislature’s intent, effectively chills [plaintiff’s] ability to bring suit under the CPA”. *Id.* at 606. Therefore, it was in fact “one-sided and overly harsh” and substantively unconscionable. *Id.*<sup>58</sup>

But Vulcan dismisses Judge Heller’s skepticism as to the continuing viability of *Zuver*’s two sentences on whether a bilateral loser pays provision would be unconscionable, in light of *Gandee*. Vulcan claims Judge Heller was “speculat[ing]”, and that *Gandee* is distinguishable because it dealt with a Consumer Protection Act claim, not a motion to compel arbitration. *Resp.*, 49 & n.31. This was no speculation and there is no valid distinction. In *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54 (2013), a wage-and-hour suit, the Court applied *Gandee* to hold an arbitration clause unconscionable, including a provision requiring the loser to pay half the arbitrator’s fee and other

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<sup>57</sup> CP 3595, citing *Gandee*, at 606.

<sup>58</sup> The defendant corporation in *Gandee* “flip[ped] the situation in *Zuver*”, arguing the arbitrator would violate Washington law by awarding a prevailing defendant attorney fees. The Court explained an additional distinction between this case and *Gandee* as opposed to *Zuver*, that it held the fee-shifting provision to be enforceable in *Zuver* because at that point in those proceedings, it was “‘mere speculation’ to assume the arbitrator would violate Washington law by not awarding costs and fees to a prevailing plaintiff.” *Id.* at 606. Westlaw cites *Gandee* as refusing to “extend” *Zuver*, using exactly that word. It is Vulcan’s argument, similar to that of the defendant in *Gandee*, that is for an extension of the law.

costs, when the employees showed that the high costs and their limited resources made arbitration cost-prohibitive.

(3) In *Zuver*, Unlike Turner's Case, There Was No Evidence Of The Chilling Effect On The Employee.

Judge Heller also noted that unlike *Zuver*, where the fee provision had not been applied, the effect on the employee here “was to impose a daunting amount ... on a terminated employee who a few months earlier had written the Arbitrator” that she could not pay for counsel and was unemployed. CP 3597. As the Washington Supreme Court concluded with regard to a virtually identical fee provision in *Gandee*, the effect on Turner was “one-sided and overly harsh.” Judge Heller also concluded it “shock[ed] the conscience.” Thus, Vulcan’s unsupported rehashing of its argument in the face of such clear precedent merits an award of attorney fees in Turner’s favor.

The Court need look no further than Washington cases to invalidate this attorney fee provision. But many other courts have held arbitration agreement unenforceable on the ground that a loser pays provision is unconscionable and violates the law. In California, like Washington, there is no question that these types of loser pays provisions in arbitration agreements are unconscionable.<sup>59</sup>

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<sup>59</sup> *E.g., Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387, 398, 116 Cal. Rptr. 3d 804, 813 (2010) (No. A127283 (refusing to enforce the agreement in part because it

**I. Attorney Fees To Turner On Appeal.**

Turner requests attorney fees on appeal. Opening Br., at 49; *e.g.*, *Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 104-05 (2010).

**III. CONCLUSION**

Turner asks the Court to reverse the order compelling arbitration and remand for trial, reverse the erroneously remanded fee award, affirm Judge Heller’s Memorandum Opinion holding that the entire fee award is void in violation of public policy, and grant attorney fees against Vulcan for Turner’s prevailing in superior court and on appeal.

RESPECTFULLY SUBMITTED this 1st day of December, 2014.

SCHROETER, GOLDMARK & BENDER

*s/Rebecca J. Roe*

REBECCA J. ROE, WSBA #7560

KATHRYN GOATER, WSBA #9648

Of Counsel:

CARLA TACHAU LAWRENCE, WSBA #14120

Counsel for Appellant Traci Turner

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included a “loser pays” provision); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 107-113, 6 P.3d 669 (2000) (requiring employee to pay arbitration fees to enforce statutory rights makes any such arbitration agreement unconscionable). Federal courts have also held that an arbitration agreement which forces an employee to pay costs is unenforceable. *See, e.g., Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.2d 1230, 1233-35 (10<sup>th</sup> Cir. 1999); *Nesbitt v. FCNH, Inc.*, No. 14-CV-00990-RBJ, 2014 WL 6477636, at \*5 (D.Colo. Nov. 19, 2014) (applying *Shankle* where fee and costs provisions would effectively preclude plaintiff from pursuing statutory claims); *Paladino v. Advent Computer Technologies, Inc.*, 134 F.3d 1054 (11<sup>th</sup> Cir. 1998); *Cole v. Burns*, 105 F.3d 1465 (D.C. Cir. 1997).

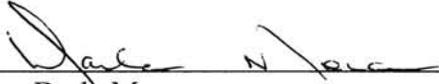
CERTIFICATE OF SERVICE

On the 1<sup>st</sup> day of December, 2014, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 1<sup>st</sup> day of December, 2014.

  
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 Darla Moran  
 Legal Assistant

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

TRACI TURNER

Appellant,

v.

VULCAN, INC., ET AL.,

Defendants.

No. 71855-0-I

APPELLANT'S GR 14.1 AUTHORITY

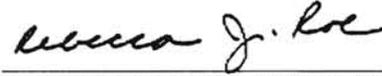
1. *Bellman v. i3Carbon, LLC*, 563 Fed.Appx. 608 (2014)
2. *Bernal v. Southwestern & Pacific Specialty Finance, Inc.*, 2013 WL 5539563
3. *Bettencourt v. Brookdale Senior Living Communities, Inc.*, 2010 WL 274331
4. *In re Carrier IQ, Inc. Consumer Privacy Litigation*, 2014 WL 1338474
5. *Chambers v. Groome Transp. of Alabama*, --- F.Supp.2d ---- 2014 WL 4230056
6. *Davis v. Cascade Tanks, LLC*, 2014 WL 3695493
7. *Elite Logistics Corp. v. Hanjin Shipping Co., Ltd.*, --- Fed.Appx. ----, 2014 WL 4654383
8. *Marquez v. Living*, 2014 WL 1379645
9. *Nesbitt v. FCNH, Inc.*, 2014 WL 6477636
10. *Newton v. American Debt Services, Inc.*, 549 Fed.Appx. 692 (2013)
11. *Stirrup v. Education Management LLC*, 2014 WL 4655438
12. *Thomas v. Bergdorf Goodman, Inc.*, 2004 WL 2979960
13. *Wilson v. Bank of America, N.A.*, 2013 WL 275018

SCHROETER GOLDMARK & BENDER

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1  
2 DATED this 1<sup>st</sup> day of December, 2014.

3 SCHROETER GOLDMARK & BENDER

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6 REBECCA J. ROE, WSBA #7560  
7 KATHRYN GOATER, WSBA #9648  
8 Counsel for Appellant

9 CARLA TACHAU LAWRENCE, WSBA  
10 #14120 (Of Counsel)

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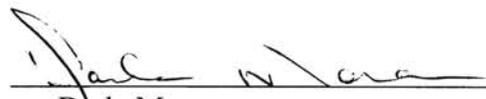
CERTIFICATE OF SERVICE

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| <p>Harry H. Schneider, Jr.<br/> Kevin J. Hamilton<br/> Joseph M. McMillan<br/> Perkins Coie LLP<br/> 1201 Third Ave., Suite 4800<br/> Seattle, WA 98101-3099</p> <p><u>HSchneider@perkinscoie.com</u><br/> <u>KHamilton@perkinscoie.com</u><br/> <u>JMcMillan@perkinscoie.com</u></p>          | <p><input checked="" type="checkbox"/> Via Hand Delivery – ABC Legal<br/> <input type="checkbox"/> Via U.S. Mail, 1<sup>st</sup> Class, Postage Prepaid<br/> <input type="checkbox"/> Via CM/ECF System<br/> <input type="checkbox"/> Via Overnight Delivery<br/> <input type="checkbox"/> Via Facsimile<br/> <input checked="" type="checkbox"/> Via Email</p> |
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 1<sup>st</sup> day of December, 2014.

  
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Darla Moran  
Legal Assistant

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563 Fed.Appx. 608

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1.

(Find CTA10 Rule 32.1)

United States Court of Appeals,  
Tenth Circuit.

Jeffrey BELLMAN, an individual; Thomas R. Samuelson, an individual, Plaintiffs–Appellees,  
v.

I3CARBON, LLC, a Colorado limited liability company; Patric Galvin, an individual; Robert Hanfling, an individual; Faisal Syed, an individual; Christopher Galvin, an individual; Rebecca Galvin, an individual; David Sunshine, an individual, Defendants–Appellants.

No. 12–1275. | May 29, 2014.

#### Synopsis

**Background:** In securities fraud action, defendants moved to compel arbitration of claims. The United States District Court for the District of Colorado denied motion. Defendants appealed.

**Holdings:** The Court of Appeals, Jerome A. Holmes, Circuit Judge, held that:

<sup>[1]</sup> agreement between parties to arbitrate did not exist, and

<sup>[2]</sup> plaintiffs were not equitably estopped to assert their lack of signature on operating agreement which contained arbitration provision as basis for avoiding arbitration.

Affirmed.

West Headnotes (2)

<sup>[1]</sup> **Alternative Dispute Resolution**  
☞ Agreements to arbitrate

No agreement to arbitrate existed between parties to sale of securities that would prevent investors from bringing securities fraud action; signature page to operating agreement containing arbitration clause listed limited liability company that was subject of purchase and another limited liability company that was also investor in that company, and neither of those parties actually signed copy of agreement that was included in investment binder, and plaintiff investors submitted uncontroverted evidence that they were never requested to sign operating agreement or agree to its provisions and that they in fact did not sign operating agreement.

Cases that cite this headnote

<sup>[2]</sup> **Alternative Dispute Resolution**  
☞ Performance, breach, enforcement, and contest of agreement

Securities fraud plaintiffs were not equitably estopped to assert their lack of signature on operating agreement containing arbitration provision as basis for avoiding arbitration; plaintiffs did not receive direct benefits from or seek to enforce their rights under operating agreement.

1 Cases that cite this headnote

#### Attorneys and Law Firms

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John William Madden, III, Esq., The Madden Law Firm, Bradford Lam, Denver, \*609 CO, Mollie B. Hawes, Miller & Steiert, P.C., Littleton, CO, for Defendants–Appellants.

Before TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

## ORDER AND JUDGMENT\*

JEROME A. HOLMES, Circuit Judge.

Defendants–Appellants i3Carbon, LLC, Patric Galvin, Robert Hanfling, Faisal Syed, Christopher Galvin, Rebecca Galvin, and David Sunshine (collectively, “Defendants”) appeal from the denial of their motion to compel arbitration of Plaintiffs–Appellees Jeffrey Bellman’s and Thomas R. Samuelson’s (together, “Plaintiffs”) claims for securities fraud. Defendants assert that the district court erred by failing to find that the parties had entered into an enforceable arbitration agreement and by refusing to apply the doctrine of equitable estoppel. Exercising our jurisdiction under 9 U.S.C. § 16(a)(1)(C), which provides that an appeal may be taken from an order denying an application to compel arbitration, we affirm.

### I

#### A

Plaintiffs brought this securities fraud case based upon alleged misstatements and omissions made at the time of their investment in i3Carbon, a Colorado limited liability company (“LLC”) that acquires, develops, and sells coal and similar commodity resources. Patric Galvin, an officer of i3Carbon, approached Mr. Samuelson and Mr. Bellman in, respectively, the late summer and early fall of 2010, regarding a possible investment in i3Carbon. It is undisputed that Mr. Galvin provided each of the Plaintiffs with a binder of materials (the “Investment Binder(s)”) relating to their possible investment. The Investment Binders contained approximately 200 pages of documents, including an unsigned Operating Agreement and two unsigned Subscription Agreements. Plaintiffs submitted declarations stating that neither of them signed, nor were asked to sign, the Operating Agreement.<sup>1</sup> Mr. Samuelson invested \$350,000 in i3Carbon in August and September 2010, and Mr. Bellman invested \$250,000 in i3Carbon in November 2010 and January 2011.

#### B

The Operating Agreement provided to Plaintiffs in the

Investment Binders states that it is an agreement dated “the — day of July, 2010” between Defendants and “the Persons whose names are set forth on Exhibit A attached hereto.” Aplt. App. at 48 (Operating Agreement, filed May 1, 2012) (formatting altered). Plaintiffs claim that the Investment Binders did not contain an Exhibit A to the Operating Agreement. The signature page to the Operating Agreement lists i3Carbon and GSC Holdings, LLC, as the only signatories to the agreement, although Plaintiffs contend that neither of those parties actually signed the copy of the agreement included in the Investment Binder.

\*610 The Operating Agreement contains an arbitration provision, stating, in pertinent part:

Any suit, ... claim, controversy, action or proceeding arising out of or relating to this Agreement or the breach, enforcement, termination or validity thereof, shall be brought exclusively in either (a) the state courts located in the City and County of Denver, Colorado, or (b) before one (1) arbitrator located in the City and County of Denver, Colorado, such arbitration to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures (an “Arbitration”). In addition to the foregoing, any party that becomes a party to a state court proceeding pursuant to (a) of this Section 11.7 may, upon written notice delivered to all other parties to the proceeding (as set forth in the complaint or other pleadings) to [sic] be transferred and determined solely pursuant to an Arbitration; provided that such party provides notice of its election to have such proceeding be determined by Arbitration within thirty (30) days following its initial receipt of the original complaint filed with a state court pursuant to (a) of this Section 11.7.

*Id.* at 78 (formatting altered).

In addition to the Operating Agreement, the Investment Binders contained a Subscription Agreement. The Subscription Agreement states that it is an agreement

“executed by the undersigned in connection with the private placement of Class A Units” and provides a space for the “undersigned Purchaser” to include his name and address. *Id.* at 162 (Subscription Agreement, dated Aug. 27, 2010). The Subscription Agreement includes a forum selection provision, stating that:

Any disputes arising out of, in connection with, or with respect to this Subscription, the subject matter hereof, the performance or non-performance of any obligation hereunder, or any of the transactions contemplated hereby shall be adjudicated by a court of competent civil jurisdiction sitting in Denver, Colorado and nowhere else.

*Id.* at 171 (emphasis added).

Mr. Samuelson signed and returned a copy of the Subscription Agreement in August 2010. In September 2010, i3Carbon sent Mr. Samuelson a signed letter agreement confirming his investment and stating, in part, “This letter agreement is intended to clarify the relationship between you and i3Carbon, LLC, and *does not supersede the subscription agreement* or the other materials you have been provided.” *Id.* at 39 (Letter Agreement, dated Sept. 23, 2010) (emphasis added). Mr. Samuelson signed and returned the letter agreement to i3Carbon.

Defendants allege that sometime after Plaintiffs received the Investment Binders, but before they made their investments, Plaintiffs had a telephone conversation with Mr. Galvin during which Mr. Bellman “stated ... that in connection with his investment he required changes in the overall agreement which included specific ‘Early Investor’ distribution terms that would significantly benefit both Bellman and Samuelson.” *Id.* at 186 (Supp. Decl. of Patric Galvin, filed June 1, 2012). According to Mr. Galvin’s declaration, Mr. Galvin obtained approval for the requested changes and informed Plaintiffs that he “would have an amended operating agreement prepared to reflect them.” *Id.* at 187. Mr. Galvin stated that he “directed the preparation of the First Amended and Restated Operating Agreement” and “directed that copies be sent to [Plaintiffs].” *Id.* Mr. Galvin further declared that he had a subsequent telephone conversation with Mr. Bellman in which Mr. Bellman claimed to have misplaced the Operating \*611 Agreement “and requested that i3Carbon send him another copy which he would then sign and return.” *Id.* Mr. Galvin claims that he did this.

Plaintiffs dispute Mr. Galvin’s version of events and have submitted declarations stating that they (1) “did not at any time request any revisions or modifications to the Operating Agreement,” (2) did not receive a copy of the Amended Operating Agreement prior to this lawsuit, (3) never signed an Amended Operating Agreement, and (4) never discussed the Operating Agreement or Amended Operating Agreement with anyone at i3Carbon. *See id.* at 157 (Decl. of Jeffrey Bellman, filed May 25, 2012); *id.* at 160–61 (Decl. of Thomas R. Samuelson, filed May 25, 2012).

The Amended Operating Agreement that Defendants claim to have sent to Plaintiffs is dated October 5, 2010. It includes an Exhibit A, which lists the shareholders in i3Carbon as GCS Holding, LLC and Mr. Samuelson. Mr. Bellman is not listed on the agreement. The Amended Operating Agreement was signed by i3Carbon and GCS Holdings, LLC, but was not signed by either Mr. Samuelson or Mr. Bellman. The Amended Operating Agreement contains an arbitration provision identical to the arbitration provision in the earlier Operating Agreement.

In September 2011, Mr. Samuelson emailed Mr. Galvin seeking an update regarding potential dividends to “round A shareholders.” *Id.* at 190 (Email from T. Samuelson to P. Galvin, dated Sept. 15, 2011). Mr. Galvin alleges that these dividends were consistent with the “requested and agreed upon ‘Early Investor’ provisions” included in the Amended Operating Agreement. *Id.* at 187. The email does not reference either the Operating Agreement or the Amended Operating Agreement.

## C

Plaintiffs filed an amended complaint against Defendants on April 17, 2012, alleging various securities-fraud violations. Defendants filed a motion to compel arbitration on May 1, 2012. Following full briefing on the issue, the district court held a hearing on June 6, 2012. At the conclusion of the hearing, the district court denied Defendants’ motion on the grounds that Defendants had “presented no evidence that creates a genuine issue of material fact as to whether or not there was a meeting of the minds and an agreement binding on the parties to arbitrate the disputes that have arisen between them with respect to their dealings ... [with] i3 Carbon.” *Id.* at 298 (Tr. of Hr’g on Mot. to Compel Arbitration, dated June 6, 2012); *see also id.* at 191–92 (Minute Order, dated June 6, 2012). Defendants subsequently filed a timely notice of

appeal.

## II

### A

We review a district court's denial of a motion to compel arbitration de novo, applying the same legal standard employed by the district court. *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1283 (10th Cir.1997). Although "[t]he Supreme Court has 'long recognized and enforced a liberal federal policy favoring arbitration agreements,' " *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir.2004) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)) (internal quotation marks omitted), the question "whether parties have a valid arbitration agreement at all" is a "gateway matter[ ]" that is "presumptively for courts to decide," *Oxford Health Plans LLC v. Sutter*, — U.S. —, 133 S.Ct. 2064, 2068 n. 2, 186 L.Ed.2d 113 (2013) (quoting *Green \*612 Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003)) (internal quotation marks omitted). Courts thus review this question "*de novo* absent 'clear[ ] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute." *Id.* (alterations in original) (quoting *AT & T Techs. v. Commc'ns Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Whether an agreement to arbitrate exists "is simply a matter of contract between the parties." *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1004 (10th Cir.2013) (quoting *Avedon Eng'g*, 126 F.3d at 1283) (internal quotation marks omitted). As such, we "apply ordinary state-law principles that govern the formation of contracts to determine whether a party has agreed to arbitrate a dispute." *Id.* (quoting *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475 (10th Cir.2006)) (internal quotation marks omitted); *Avedon Eng'g*, 126 F.3d at 1287.

"When parties dispute the making of an agreement to arbitrate, a jury trial on the existence of the agreement is warranted unless there are no genuine issues of material fact regarding the parties' agreement." *Hardin*, 465 F.3d at 475 (quoting *Avedon Eng'g*, 126 F.3d at 1283) (internal quotation marks omitted). That is, "when factual disputes [seem likely to] determine whether the parties agreed to arbitrate, the way to resolve them isn't by round after round of discovery and motions practice. It is by proceeding *summarily* to trial." *Howard v. Ferrellgas*

*Partners, L.P.*, 748 F.3d 975, 984 (10th Cir.2014). By contrast, "[w]hen it's apparent ... that no material disputes of fact exist it may be permissible and efficient for a district court to decide the arbitration question as a matter of law through motions practice and viewing the facts in the light most favorable to the party opposing arbitration." *Id.* at 977; see, e.g., *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1261 (10th Cir.2012), *cert. denied*, — U.S. —, 133 S.Ct. 2009, 185 L.Ed.2d 868 (2013); *Hardin*, 465 F.3d at 474–75.

In ascertaining whether questions of material fact remain, we give the nonmoving party—here, Plaintiffs—"the benefit of all reasonable doubts and inferences that may arise." *Hancock*, 701 F.3d at 1261 (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir.1980)) (internal quotation marks omitted). We have previously explained that the framework for analyzing this issue "is similar to summary judgment practice": the party moving to compel arbitration bears the initial burden of presenting evidence sufficient to demonstrate the existence of an enforceable agreement; if it does so, the burden shifts to the nonmoving party to raise a genuine dispute of material fact regarding the existence of an agreement. *Id.* As noted above, if a genuine dispute of material fact exists, the Federal Arbitration Act ("FAA") calls for a summary trial. See *Howard*, 748 F.3d at 984. Only "when it's clear no material disputes of fact exist and only legal questions remain" may a court resolve the arbitration question by ruling on a motion to compel, rather than conducting a summary trial. *Id.*

Defendants have also argued that the district court erred in rejecting their equitable estoppel argument. We have not yet decided whether the de novo standard that generally applies to our review of a denial of a motion to compel arbitration also applies to a denial of such a motion based on equitable estoppel, or whether some other standard of review applies. See *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 Fed.Appx. 704, 707 (10th Cir.2011). Other circuits are split on this issue, with some courts reviewing such decisions de novo, and others for an abuse of \*613 discretion. See *id.* (noting that the Fourth and Fifth Circuits review for abuse of discretion, while the Third, Eighth, Ninth, and Eleventh Circuits review de novo). It is unnecessary for us to decide here which standard applies because Defendants' equitable estoppel argument fails regardless.

We turn now to Defendants' arguments on appeal.

**B**

<sup>111</sup> Defendants principally challenge the district court's determination that, as a matter of law, an agreement to arbitrate between the parties does not exist. Alternatively, Defendants argue that the district court erred by refusing to find that Plaintiffs were equitably estopped from denying the enforceability of the arbitration provision in the Operating Agreement because, according to Defendants, Plaintiffs have benefitted from and attempted to enforce other provisions of the Operating Agreement. We begin by addressing whether an enforceable agreement exists between the parties and then turn to Defendants' equitable estoppel argument.

As noted above, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Spahr v. Secco*, 330 F.3d 1266, 1269 (10th Cir.2003) (quoting *AT & T Techs.*, 475 U.S. at 648, 106 S.Ct. 1415) (internal quotation marks omitted). And, although the presence of an arbitration clause generally creates a presumption in favor of arbitration, see *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir.1995) ("If a contract contains an arbitration clause, a presumption of arbitrability arises, particularly if the clause in question contains ... broad and sweeping language."), "this presumption disappears when the parties dispute the existence of a valid arbitration agreement," *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir.2002); see also *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir.1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away.>").

We " 'apply ordinary state-law principles that govern the formation of contracts' to determine whether a party has agreed to arbitrate a dispute." *Hardin*, 465 F.3d at 475 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). Here, the parties agree that Colorado law governs this question. Under Colorado law, a contract requires a "meeting of the minds." See *Schulz v. City of Longmont, Colo.*, 465 F.3d 433, 438 n. 8 (10th Cir.2006) (quoting *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192 (Colo.2001)) (internal quotation marks omitted). This is true for both express contracts and contracts that are implied in fact based on the conduct of the parties. See *id.*; see also *N.Y. Life Ins. Co. v. K N Energy, Inc.*, 80 F.3d 405, 412 (10th Cir.1996) ("Although implied in fact contracts can be based on the conduct of the parties, 'there must be a meeting of the minds before any contract will be implied.'" (quoting *A.R.A. Mfg. Co. v. Cohen*, 654 P.2d 857, 859 (Colo.App.1982))).

Here, the district court concluded that "the defendant has presented no evidence that creates a genuine issue of material fact as to whether or not there was a meeting of the minds and an agreement binding on the parties to arbitrate the disputes that have arisen between them." *Aplt. App.* at 298. We agree. Specifically, we conclude that Defendants have failed to show that the "conduct of the parties ... evidences a mutual intention to contract with each other," *N.Y. Life Ins.*, 80 F.3d at 412 (quoting *Tuttle v. ANR Freight Sys., Inc.*, 797 P.2d 825, 829 (Colo.App.1990)) \*614 (internal quotation marks omitted), or that there was a "meeting of the minds," *id.* (quoting *A.R.A. Mfg.*, 654 P.2d at 859) (internal quotation marks omitted).

Defendants argue that Plaintiffs manifested their acceptance of the Operating Agreement, and specifically the arbitration provision, when they invested in i3Carbon following receipt of the approximately 200-page Investment Binder. However, the Operating Agreement included in the Investment Binder did not have Plaintiffs' names on it and did not indicate that Plaintiffs were expected to sign it. Moreover, Plaintiffs have submitted uncontroverted evidence that (1) i3Carbon never requested that they sign the Operating Agreement or agree to its provisions, and (2) Plaintiffs, in fact, did not sign the Operating Agreement.

Defendants attempt to minimize the importance of the parties' failure to sign the Operating Agreement by arguing that an arbitration agreement does not need to be signed to be enforceable. Specifically, Defendants correctly note that "[w]hile the [FAA] requires a writing evidencing an agreement to arbitrate disputes, it is well-established that the FAA does not require signatures of the parties to be enforceable." *Aplt. Opening Br.* at 19; see, e.g., *Med. Dev. Corp. v. Indus. Molding Corp.*, 479 F.2d 345, 348 (10th Cir.1973) (noting that it is "not necessary ... that a party sign the writing containing the arbitration clause"). However, while a signature is not always required, the parties must still have entered into a valid arbitration agreement under state law. See *E-21 Eng'g, Inc. v. Steve Stock & Assocs., Inc.*, 252 P.3d 36, 39 (Colo.App.2010) ("[T]he lack of signature in and of itself does not invalidate an otherwise enforceable agreement to arbitrate."). Thus, while Defendants are correct in asserting that the parties' failure to sign the Operating Agreement is not dispositive, this does not relieve Defendants of their burden to establish the existence of an enforceable agreement in the first place.

Here, Defendants have failed to carry their burden of showing that an enforceable arbitration agreement exists.

First, it is undisputed that the Investment Binder contained conflicting provisions regarding arbitration. While the Operating Agreement provided for arbitration, the Subscription Agreement did not. In our view, the documents in the Investment Binder do not demonstrate a meeting of the minds regarding arbitration.<sup>2</sup>

Furthermore, we underscore that the only signed documents in the record are Mr. Samuelson's August 27, 2010 Subscription Agreement and the September 22, 2010 letter from i3Carbon to Mr. Samuelson. Neither of these documents evinces an agreement by Plaintiffs to arbitrate their claims. To the contrary, the Subscription Agreement explicitly provides that any disputes shall be heard by "a court of competent civil jurisdiction sitting in Denver, Colorado and nowhere else." Aplt. App. at 171. The September 22, 2010 letter reiterates that it was intended to clarify the relationship of the parties, but "does not supersede the subscription agreement or the other materials you have \*615 been provided." *Id.* at 39. While the September 22 letter specifically references the Subscription Agreement (which explicitly provides that disputes will be resolved by the courts) it does not do the same with regard to the Operating Agreement, or otherwise identify any arbitration provision.

Defendants have failed to articulate why the Operating Agreement (including its arbitration provision)—which neither of the parties signed—should be binding, but the Subscription Agreement—which was contained in the same binder and actually signed by Mr. Samuelson—should not be enforced.<sup>3</sup> Defendants' argument essentially boils down to their assertion that Plaintiffs' mere investment in i3Carbon following their receipt of a binder containing an unsigned Operating Agreement somehow establishes that Plaintiffs agreed to, and accepted, the terms of the Operating Agreement, including its arbitration provision. However, in light of the conflicting provisions contained in the Investment Binder, this argument is unpersuasive.

Based on the foregoing, the district court correctly concluded that no genuine dispute of material fact exists regarding whether the parties entered into an agreement to arbitrate. Accordingly, the district court properly denied Defendants' motion to compel arbitration on this basis.

### C

<sup>121</sup> We turn now to Defendants' argument that "Plaintiffs are equitably estopped from asserting their lack of signature on the Operating Agreements as a basis [for]

avoiding arbitration." Aplt. Opening Br. at 23. In support of their argument, Defendants cite *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir.2000), which states:

In the arbitration context, the [equitable estoppel] doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

*Id.* at 418; see also *Pikes Peak Nephrology Assocs., P.C. v. Total Renal Care, Inc.*, No. 09-CV-00928-CMA-MEH, 2010 WL 1348326, at \*8 (D.Colo. March 30, 2010) (finding that plaintiff was bound by unsigned arbitration agreement where plaintiff received benefits from the contract and sought to enforce his rights under the terms of the contract). However, both *International Paper* and *Pikes Peak* involved situations where the non-signing party sought to take advantage of beneficial terms of the agreement while simultaneously disavowing the enforceability of the agreement's arbitration clause. See *Int'l Paper*, 206 F.3d at 418 ("International Paper's entire case hinges on its asserted rights under the ... contract; it cannot seek to enforce those contractual rights \*616 and avoid the contract's requirement that 'any dispute arising out of' the contract be arbitrated."); *Pikes Peak*, 2010 WL 1348326, at \*8 ("[B]ecause [plaintiff] seeks adjudication of his rights and remedies under the [agreement], and because he ... seeks the benefits of the [agreement], it follows that he would at least be bound by the contractual procedures for resolving disputes arising therefrom."). Here, in contrast, Plaintiffs did not receive direct benefits from or seek to enforce their rights under the Operating Agreement. For this reason, the present case is distinguishable from the factual situations present in *International Paper* and *Pikes Peak*.

Defendants disagree with this conclusion, arguing that Plaintiffs did in fact benefit from and seek to enforce their rights under the Operating Agreement. Specifically, Defendants point to a telephone conversation between Plaintiffs and Mr. Galvin, in which Mr. Bellman allegedly requested that the "overall agreement" be changed to include distribution terms for early investors. See Aplt. App. at 186. Defendants then made changes reflecting Plaintiffs' request in an Amended Operating Agreement. In his declaration, Mr. Galvin asserts that he directed a

copy of the Amended Operating Agreement to be sent to Plaintiffs. However, Plaintiffs have submitted declarations swearing that they never received the Amended Operating Agreement, and that neither of them ever signed or agreed to the terms of the Amended Operating Agreement. Several months later, Mr. Samuelson sent an email to i3Carbon requesting early investor distributions. The email did not reference the Operating Agreement or the Amended Operating Agreement in any way.<sup>4</sup>

Based on these facts, Defendants cannot establish that Plaintiffs sought a change to the Operating Agreement and thereafter sought to benefit from or enforce rights under the original or amended agreement. For one, Plaintiffs merely sought a change to the “overall agreement.” See *id.* at 157, 160, 186–87. They never requested that the change be made to the Operating Agreement (which contains the arbitration provision) or that the change be reflected in an Amended Operating Agreement. Thus, the fact that Defendants chose to reflect the change in the Amended Operating Agreement does not somehow elevate that document above the other documents sent to Plaintiffs in the Investment Binder, such as the Subscription Agreement (which explicitly provides that courts will resolve the disputes).

Moreover, as Plaintiffs note, they “never agreed that their entire agreement was governed by and reflected in either Operating Agreement, and [they] did not receive or sign the Amended Operating Agreement.” Aplee. Br. at 28. Defendants have not established otherwise. Thus, contrary to Defendants’ assertion, there is no evidence that Plaintiffs “sought to rely on provisions in the Amended Operating Agreement to request early investor distributions.” Aplt. Reply Br. at 16. In fact, Defendants cannot even establish that Plaintiffs received the Amended Operating Agreement,<sup>5</sup> much less that they \*617 agreed to its terms. And it is undisputed that Plaintiffs never received an early investor distribution, and they have not made a claim for such a distribution in their pending lawsuit. Furthermore, the present case is distinguishable from *International Paper and Pikes Peak* in that Plaintiffs’ “amended complaint states no claim for any relief or indication that the plaintiffs are seeking any benefit under the terms of the operating agreement in either form.” Aplt. App. at 295–96. Indeed, the Operating Agreement is not mentioned anywhere in the amended complaint.

Defendants acknowledge that Plaintiffs have not alleged a breach-of-contract claim, but nonetheless argue that equitable estoppel should apply because Plaintiffs have included claims “that relate in various ways to the

Operating Agreement.”<sup>6</sup> Aplt. Opening Br. at 15. However, in *Lenox*, a case arising under Colorado law, a panel of our court held that the doctrine of equitable estoppel does not apply merely because plaintiffs have asserted claims that relate to or are “factually significant” to the agreement at issue embodying the arbitration provision. 449 Fed.Appx. at 709–10. More specifically, “[f]or a plaintiff’s claims to rely on the contract containing the arbitration provision, the contract must form the legal basis of those claims; it is not enough that the contract is factually significant to the plaintiff’s claims or has a ‘but-for’ relationship with them.” *Id.* at 709. In other words, “[t]he claims must be ‘so intertwined with the agreement’ that ‘it would be unfair to allow the signatory [7] to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement.’ ” *Id.* at 710 (quoting *PRM Energy Sys., Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 835 (8th Cir.2010)).

In *Lenox*, the defendants contended that the plaintiff’s claims “rely on the Agreement because they are significantly related to, make reference to, or presume the existence of the Agreement.” *Id.* at 709. The panel rejected this argument, finding that while the agreement was “factually significant to [the plaintiff’s] claims,” it did not “form the legal basis for [those] claims” because “[the plaintiff was] not attempting to hold the non-signatory liable pursuant to duties imposed by the agreement, and its claims [did] not depend on whether [the defendants’] conduct was proper under the Agreement.” *Id.* at 710 (citation omitted) (quoting *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir.2000)) (internal quotation marks omitted). As such, the panel concluded that the plaintiff did “not rely on the terms of the Agreement in a manner that would make it unfair for [the plaintiff] to avoid arbitrating those claims.” *Id.*

\*618 Applying the reasoning of *Lenox* here leads ineluctably to a similar outcome. Specifically, Plaintiffs do not assert a claim for breach of the Operating Agreement or seek to enforce any rights or recover any remedies under the Operating Agreement. While Plaintiffs’ complaint relies on materials other than the Operating Agreement provided in the Investment Binder, along with alleged statements made by Defendants, the Operating Agreement does not “form the legal basis” of Plaintiffs’ claims. See *id.* at 709–10. Rather, Plaintiffs’ claims are based on allegedly fraudulent misrepresentations and omissions of material fact made by Defendants in order to secure funding. None of these claims relate to statements or omissions made in the Operating Agreement. In fact, as noted above, Plaintiffs’

complaint does not even reference the Operating Agreement. It follows perforce that Plaintiffs' claims cannot be deemed to have *relied* on the Operating Agreement in a manner that would make it unfair for Plaintiffs to avoid arbitrating their claims. *See id.* at 710. For these reasons, the district court properly concluded that Plaintiffs are not equitably estopped from disavowing the enforceability of the Operating Agreement's arbitration provision.

### III

For the foregoing reasons, we affirm the district court's denial of Defendants' motion to compel arbitration.

#### Footnotes

- \* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.
- <sup>1</sup> Defendants have implied in their briefing on appeal that a signed copy of the Operating Agreement may exist, but it cannot be located. However, in their earlier briefing, Defendants admitted that "neither Bellman, nor Samuelson signed either Operating Agreement." *Aplt. App.* at 28 (Mot. to Compel Arbitration, filed May 1, 2012).
- <sup>2</sup> This is consistent with the approach taken by other courts. *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F.Supp.2d 967, 992 (C.D.Cal.2012) (refusing to compel arbitration where two documents contained conflicting arbitration provisions that were "not only ambiguous" but also "fundamentally incompatible"); *Rockel v. Cherry Hill Dodge*, 368 N.J.Super. 577, 847 A.2d 621, 623–24 (N.J.Super.Ct.App.Div.2004) (holding that where "parties executed two documents which contain separate and somewhat disparate arbitration clauses [, t]his ambiguity ... is fatal to the compelling of the arbitration of plaintiffs' ... claims").
- <sup>3</sup> Any attempt by Defendants to give the unsigned Operating Agreement particular weight or significance is unpersuasive. The validity of the Operating Agreement, including whether the parties agreed to its terms, whether those terms are ambiguous, and whether its terms conflict with the Subscription Agreement, must be determined under ordinary state contract law. *See, e.g., Condo v. Conners*, 266 P.3d 1110, 1115 (Colo.2011) (rejecting argument that operating agreement functioned as a "super-contract" and finding instead that an operating agreement should be interpreted "in light of prevailing principles of contract law"); *In re DB Capital Holdings, LLC*, 463 B.R. 142, 2010 WL 4925811, at \*3 n. 21 (B.A.P. 10th Cir.2010) (unpublished disposition) ("Absent a contrary statutory provision, Colorado courts consider a limited liability company's operating agreement according to the general principles of contract law.").
- <sup>4</sup> With regard to the email, the district court noted: "You can read that e-mail exchange until you're blue in the face, and you will not find any express or, in my view, implied indication in there that either Mr. Bellman or Mr. Samuelson were agreeable to the terms of either version of the operating agreement." *Aplt. App.* at 294.
- <sup>5</sup> Mr. Galvin declares in his supplemental affidavit that he had a telephone conversation with Mr. Bellman in which Mr. Bellman "stated that he had misplaced the Operating Agreement and requested that i3Carbon send him another copy which he would then sign and return." *Aplt. App.* at 187. However, as noted by the district court, even "[t]aking that as true, it does not mean that [Mr. Bellman] received or certainly signed ... the amended version of the operating agreement." *Id.* at 294.
- <sup>6</sup> Plaintiffs allege numerous securities-fraud violations based on alleged misrepresentations and omissions made by Defendants. Specifically, Plaintiffs claim that Defendants knowingly made false representations and omissions of material fact relating to the health and sales capacity of i3Carbon in order to secure funding, thereby violating section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78t(a), and various sections of the Colorado Securities Act. Plaintiffs also state claims for negligent misrepresentation, common law fraud, and civil theft pursuant to Colo.Rev.Stat. § 18–4–405.
- <sup>7</sup> In *Lenox*, a non-signatory sought to enforce an arbitration provision against a signatory to the agreement. *See* 449 Fed.Appx. at 705–07. Here, none of the parties signed the Operating Agreement. Moreover, only the Defendants signed the Amended Operating Agreement; neither of the Plaintiffs did.





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2013 WL 5539563

Only the Westlaw citation is currently available.  
United States District Court, N.D. California  
Oakland Division

Paula Bernal, on behalf of herself and all persons  
similarly situated, Plaintiff,

v.

Southwestern & Pacific Specialty Finance, Inc. dba  
Check 'N Go, and Does 1 through 100 inclusive,  
Defendants.

Case No: C 12-05797 SBA | Filed October 8, 2013

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### ORDER

#### Docket 13, 27

SAUNDRA BROWN ARMSTRONG, United States  
District Judge

\*1 Plaintiff Paula Bernal ("Plaintiff") brings the instant action on behalf of herself and a putative class of similarly situated persons against Defendant Southwestern & Pacific Specialty Finance, Inc., dba Check 'N Go ("Defendant"), alleging that Defendant made consumer loans in violation of California Financial Code § 22000 et seq., and California Business and Professions Code § 17200 et seq. Compl., Dkt. 1. The parties are presently before the Court on Defendant's motion to compel arbitration and stay proceedings. Dkt. 13. Plaintiff opposes the motion and has filed a motion for leave to conduct discovery. Dkt. 22. Having read and considered the papers filed in connection with these matters and being fully informed, the Court hereby DENIES Defendant's motion to compel arbitration and stay proceedings without prejudice, and DENIES Plaintiff's motion for leave to conduct discovery without

prejudice, for the reasons stated below. The Court, in its discretion, finds these matters suitable for resolution without oral argument. *See* Fed.R.Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

#### I. BACKGROUND

Defendant is a corporation based in Ohio and does business throughout California. *Id.* ¶ 2. Defendant offers California residents deferred deposit loans, commonly referred to as "payday loans," and installment loans *Id.* ¶ 12. Although Defendant has "stores" in California, it offers a substantial percentage of its loans over the Internet through its website. *Id.*

Plaintiff is a California resident. Compl. ¶ 1. On March 30, 2011, she entered into an Installment Loan Agreement ("Loan Agreement") with Defendant. *Id.* ¶ 26. The Loan Agreement provides that Plaintiff will receive a loan of \$2,600 and is required to repay principal and interest in 17 installment payments from April 15, 2011 to November 25, 2011. *Id.* ¶ 26. It also provides an APR (i.e., annual percentage rate) of 219.22% and finance charges of \$2,415.84. *Id.* The Loan Agreement was obtained by Plaintiff after she completed an online application on Defendant's website. *Id.* ¶ 27. Plaintiff alleges that portions of the loan application appeared as "popups" on her computer monitor, and that she was "required to click on boxes to signify that she had 'signed' the agreement." *Id.* According to Plaintiff, the Loan Agreement is procedurally unconscionable and contains substantively unconscionable terms, including the amount of the finance charges and the APR. *Id.* ¶ 28. As of the date the complaint was filed, Plaintiff had paid \$295 towards the amount owed under the Loan Agreement. *Id.* ¶ 33.<sup>1</sup>

\*2 On October 15, 2012, Plaintiffs commenced the instant action in the Superior Court of California, County of Alameda, alleging claims for violation of California Financial Code § 22000 et seq., and California Business and Professions Code § 17200 et seq. *See* Compl. On November 13, 2012, Defendant removed the action to this Court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). Notice of Removal, Dkt. 1. The parties are now before the Court on Defendant's motion to compel arbitration and stay proceedings. Dkt. 13. Plaintiff opposes the motion and has filed a motion for leave to conduct discovery. Dkt. 22.

#### II. LEGAL STANDARD

Under the Federal Arbitration Act (“FAA”), any party bound by an arbitration agreement that falls within the scope of the FAA may bring a petition in federal district court to compel arbitration. 9 U.S.C. § 4. In line with the “liberal federal policy favoring arbitration,” and the “fundamental principle that arbitration is a matter of contract,” courts “must place arbitration agreements on an equal footing with other contracts.” *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745, (2011) (internal citations omitted). When faced with a petition to compel arbitration, the district court’s role is limited to “determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.” *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (internal quotation marks omitted). If a party seeking arbitration establishes these two factors, the court must compel arbitration. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

Arbitration is a matter of contract. *AT & T Techs., Inc. v. Commc’ns Workers of America*, 475 U.S. 643, 648 (1986). Thus, arbitration agreements may “be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, 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.” *Concepcion*, 131 S.Ct. at 1746 (internal quotation marks omitted). However, even generally applicable doctrines such as duress or unconscionability cannot be applied in a way that disfavors and undermines arbitration. *Id.* at 1747.

### III. DISCUSSION

#### A. Motion to Compel Arbitration

Defendant contends that arbitration is appropriate because, as part of Plaintiff’s installment loan transaction, Plaintiff entered into a valid Arbitration Agreement with Defendant that “covers” the claims asserted in the complaint. *See* Def.’s Mtn. at 2. According to Defendant, the Arbitration Agreement was “conspicuously disclosed” in the Loan Agreement, and is “clear and straightforward” and “mutual and fair.” *Id.*

In response, Plaintiff argues that that the Arbitration Agreement is substantively and procedurally unconscionable, and that the Installment Loan Agreement submitted by Defendant in support of the instant motion was generated internally by Defendant and is not the same as the online loan application that she completed on Defendant’s website. Pl.’s Opp. at 2; Bernal Decl. ¶¶ 3–4, Exh. 1. While Plaintiff does not have a copy of the loan

application she completed on March 30, 2011, she “believes” that the layout and formatting of the loan application currently found on Defendant’s website<sup>2</sup> is “substantially identical if not identical to the webpage she used to obtain the subject Loan.” *See* Pl.’s Opp. at 3; Bernal Decl. ¶ 8. She states that “[w]hile some terms might use[ ] different wording than used back in 2011,” she believes that the “layout and formatting, font size, etc. is ... the same between the current webpage and the 2011 webpage used by Plaintiff.” Pl.’s Mtn. at 3.

\*3 Plaintiff avers that while she “cannot say the contents of the loan agreement [she] signed are different from the printed version submitted by [Defendant], [she] can say that things that appear relatively obvious and clear on the printed version did not at all appear obvious or clear on the onscreen version she signed.” Bernal Decl. ¶ 9. Specifically, Plaintiff states that the arbitration provision in the online application was located inside a box on the screen,<sup>3</sup> and that “[t]he onscreen version had much smaller fonts and the text was harder to read than the comparable wording in the printed agreement [submitted by Defendant].” Bernal Decl. ¶ 5. Further, Plaintiff notes that the current version of the online loan application contains a “tiny” pre-checked box on the bottom of the larger box containing the Arbitration Agreement indicating that a consumer has agreed to accept the terms of the Arbitration Agreement.<sup>4</sup> Pl.’s Mtn. at 4. Plaintiff “believes” that the online application she completed also contained a pre-checked box at the bottom of the Arbitration Agreement box indicating that she agreed to accept the terms of the Arbitration Agreement unless she “unchecked” the box. Bernal Decl. ¶ 12.

The first step of the Court’s role under the FAA is to determine whether an enforceable agreement to arbitrate exists. *Cox*, 533 F.3d at 1119. When one party disputes whether an arbitration agreement applies, the FAA requires the Court to determine whether an agreement to arbitrate exists before compelling arbitration under the agreement. *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir.2007). Even when the agreement is covered by the FAA, courts apply state contract law to determine whether an agreement is valid. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 994 (9th Cir.2010).

Unconscionability is one of the “generally applicable contract defenses” which may invalidate an arbitration agreement. *See Concepcion*, 131 S.Ct. at 1746. The party opposing arbitration bears the burden of proving that the arbitration provision is unconscionable. *Arguelles—Romero v. Superior Court*, 184 Cal.App.4th 825, 836 (2010). “Unconscionability has both a procedural and substantive element.” *Armendariz v.*

*Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 114 (2000).

“Procedural unconscionability pertains to the making of the agreement; it focuses on the oppression that arises from unequal bargaining power and the surprise to the weaker party that results from hidden terms or the lack of informed choice.” *Ajajian v. CantorCO2e, L.P.*, 203 Cal.App.4th 771, 795 (2012) (emphasis added). “Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.” *Flores v. Transam. Homefirst, Inc.*, 93 Cal.App.4th 846, 853 (2001).

The substantive element of unconscionability focuses on “overly harsh” or “onesided” results. *Armendariz*, 24 Cal.4th at 114 (quotations and citations omitted). “Substantive unconscionability centers on the terms of the agreement and whether those terms are so one-sided as to shock the conscience.” *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir.2003) (internal quotation mark omitted). “[M]utuality is the ‘paramount’ consideration when assessing substantive unconscionability.” *Pokorny*, 601 F.3d at 997–998. To avoid being found substantively unconscionable, “arbitration agreements must contain at least ‘a modicum of bilaterality’....” *Id.* at 998.

Both the procedural and substantive elements must be present to invalidate a contract for unconscionability, but they need not be present in equal parts. *Zullo v. Superior Court*, 197 Cal.App.4th 477, 484 (2011) (citation omitted). “[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.” *Armendariz*, 24 Cal.4th at 114.

\*4 Here, Plaintiff argues that the Arbitration Agreement is both procedurally and substantively unconscionable. As such, the specific layout, formatting, and contents of the loan application completed by Plaintiff on March 30, 2011 are essential to the Court’s determination of whether a valid agreement to arbitrate exists. While it is undisputed that the Arbitration Agreement was presented to Plaintiff as part of her online application for a loan, neither party has submitted a copy of Plaintiff’s online loan application. Instead, Plaintiff has submitted a copy of the current version of the loan application as it appears on Defendant’s website, asserting that while she does not have a copy of her loan application, she believes that the

current version of Defendant’s loan application is “substantially identical in terms of the formatting and layout, font size, etc. of the online application [she] completed ... in March 2011.” Bernal Decl. ¶ 8; Pl.’s Mtn. at 3. Defendant, for its part, does not concede that the current version of its online loan application is the same as the version completed by Plaintiff on March 30, 2011. Nor does Defendant contend that that Installment Loan Agreement it submitted in support of the instant motion is the online application completed by Plaintiff on March 30, 2011.<sup>5</sup>

Absent a copy of Plaintiff’s March 30, 2011 loan application or a stipulation from the parties regarding the specific layout, formatting, and contents of the Loan Agreement as it appeared on the loan application, the Court lacks a sufficient foundation to determine whether a valid agreement to arbitrate exists. Accordingly, because a determination that a valid agreement to arbitrate exists is a prerequisite to granting a motion to compel arbitration, Defendant’s motion to compel arbitration and stay proceedings is DENIED. Defendant’s motion is denied without prejudice to the filing of a motion that rectifies the deficiencies discussed above.

#### **B. Motion for Leave to Conduct Discovery**

In the event that the Court does not “accept” Plaintiff’s assertion that the layout and formatting that currently appears on Defendant’s website “fairly depicts the formatting and layout as of March 2011,” Plaintiff requests leave to conduct limited discovery. Pl.’s Opp. at 14–15. Specifically, Plaintiff requests leave to obtain “[t]estimony and/or documentary or electronic evidence regarding the exact layout, formatting and contents of the webpage used to apply for installment loans as of March 30, 2011.” *Id.* at ii. However, Plaintiff states that “[t]o the extent Defendant concedes that Plaintiff’s Exhibits 1 and 2 fairly depict the formatting, layout and contents of the Loan Agreement as it appeared on Plaintiff’s computer screen when she applied for and was approved to receive the loan, then discovery is not necessary.” Pl.’s Mtn. at 15.

In response, Defendant does not concede that Plaintiff’s Exhibits 1 and 2 fairly depict the formatting, layout and contents of the Loan Agreement as it appeared on Plaintiff’s computer screen in March 30, 2011. Instead, Defendant argues, without elaboration, that discovery is not appropriate because the declarations and exhibits submitted by the parties “describe the circumstances surrounding the installment loan obtained by Plaintiff from [it] in 2011.” Def.’s Reply at 6. Defendant further argues that discovery should be denied because Plaintiff has not identified any specific discovery that she needs

that would impact the Court's procedural unconscionability analysis. *Id.*

\*5 The Federal Rules "govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." Fed.R.Civ.P. 1. Rule 81 provides that the Federal Rules govern judicial proceedings "relating to arbitration," "except as [the FAA] provide[s] other procedures." Fed.R.Civ.P. 81(a)(6)(B) (emphasis added). Courts have determined that the discovery procedures of Rule 26 are applicable in the context of actions seeking to compel arbitration under § 4 of the FAA. *See Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 276 (7th Cir.1995) (in ruling on a petition to compel arbitration, a district court could order discovery pursuant to Rule 26 on matters relevant to the existence of an arbitration agreement); *Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 482 (4th Cir.1999) ("Rule 81... authorize[s] a district court, in enforcing an arbitration agreement, to 'order discovery pursuant to [Rule 26] on matters relevant to the existence of an arbitration agreement.'").

Based on the record presented, the Court finds that discovery is not warranted at this juncture. In the Court's view, the parties should be able to resolve their dispute regarding the layout, formatting, and contents of Plaintiff's March 30, 2011 loan application without the need for formal discovery. Therefore, the Court orders the parties to meet and confer in good faith for the purpose of resolving this dispute. In the event the parties are unable to reach an agreement through either Defendant's production of Plaintiff's online loan application or a stipulation as to the specific layout, formatting, and contents of the application as it appeared on March 30, 2011, Plaintiff may file a renewed motion for discovery setting forth the specific limited discovery she seeks and

how she intends to obtain such information.

#### IV. CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED THAT:

1. Defendant's motion to compel arbitration and stay proceedings is DENIED without prejudice to the filing of a renewed motion that rectifies the deficiencies identified above.
2. Plaintiff's motion for leave to conduct discovery is DENIED without prejudice to renewal after the parties meet and confer in a good faith effort to resolve the issues giving rise to the need for discovery.
3. Defendant's motion for order extending time for and staying scheduling obligations and discovery pending resolution of motion to compel arbitration and stay proceedings is DENIED without prejudice. Prior to the filing of any renewed motion for such relief, Defendant shall meet and confer in good faith with Plaintiff for the purpose of determining whether a dispute exists regarding the relief sought. If a dispute does not exist, the parties shall submit a stipulation. If the parties are unable to agree on the relief sought, Defendant may file a renewed motion.
4. This Order terminates Docket 13 and Docket 27.

IT IS SO ORDERED.

#### Footnotes

- 1 Plaintiff alleges that during the Class Period, Defendant offered, originated or made Installment Loans to Class Members. Compl. ¶ 35. In each of those instances, Defendant allegedly used a substantially similar Loan Agreement and imposed finance charges amounting to at least 150% APR and more commonly 219% APR. *Id.* Plaintiff alleges that, in each of those instances, the Loan Agreement was an adhesion contract and was procedurally unconscionable, and that the APR of the loan made the loan substantively unconscionable. *Id.*
- 2 Plaintiff's reference to the "current" version of the loan application refers to the loan application that was available on Defendant's website at the time she filed her opposition to the instant motion. The current version of the loan application can be found on the Defendant's website at <https://www.checkngo.com/pdlApplication.aspx>.
- 3 Plaintiff states that that the entire text of the Arbitration Agreement is not visible unless a person uses the "scroll bar" on the side of the box containing the Arbitration Agreement to scroll down. Bernal Decl. ¶ 10.
- 4 A review of Defendant's website reveals that Plaintiff is correct. *See* <https://www.checkngo.com/pdlApplication.aspx>

- 5 A comparison of the documents submitted by the parties reveals that the Installment Loan Agreement submitted by Defendant is not similar in its layout or formatting to the online loan application printout submitted by Plaintiff. *Compare* Dean Decl., Exh. A with Dkt. 22, Exh. 1. A comparison of the documents also reveals that the language of the Arbitration Agreement is not identical. *Seeid.* The Court notes that the extent of the differences between the two documents with respect to the Arbitration Agreement is unclear because the online loan application printout submitted by Plaintiff only includes one paragraph of the Arbitration Agreement, while the Installment Loan Agreement submitted by Defendant contains seven numbered paragraphs. *Seeid.*
- 6 Exhibit 1 is a printout of the current version of the online loan application on Defendant's website. Bernal Decl. ¶ 8; *see* Dkt. 23. Exhibit 2 is a printout of the contents of the "Arbitration Box" found on the online application screen. Bernal Decl. ¶ 13; *see* Dkt. 23.

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2010 WL 274331

Only the Westlaw citation is currently available.  
United States District Court, D. Oregon.

Deanna BETTENCOURT, Plaintiff,  
v.  
BROOKDALE SENIOR LIVING COMMUNITIES,  
INC., Defendants.

No. 09-CV-1200-BR. | Jan. 14, 2010.

## OPINION AND ORDER

BROWN, Judge.

\*1 This matter comes before the Court on Defendant Brookdale Senior Living Communities, Inc.'s Motion (# 4) to Compel Arbitration and Stay or Abate Lawsuit Pending Arbitration.

For the reasons that follow, the Court **DEFERS** ruling on Defendant's Motion pending trial pursuant to § 4 of the Federal Arbitration Act (FAA) to resolve whether the parties actually formed an arbitration agreement. After the jury decides that question, the Court will determine how Plaintiff's Motion for Partial Summary Judgment (# 14) should be resolved.

### West KeySummary

#### 1 Federal Civil Procedure

☛ Employees and Employment Discrimination,  
Actions Involving

Genuine issue of material fact existed as to whether employee and employer formed an agreement to arbitrate. Employee signed an at-will contract which contained an arbitration provision and was subsequently terminated from employment. Employee contended that the parties did not form an agreement to arbitrate her claims on the grounds that there was a lack of assent by employer to the terms of the agreement as employer failed to sign agreement. Although employer contended its signature was not required to create a binding arbitration agreement, written terms of agreement indicated otherwise and employer failed to give an explanation for the lack of signature.

Cases that cite this headnote

#### Attorneys and Law Firms

Jeff Merrick, Jeff Merrick, P.C., Lake Oswego, OR, for Plaintiff.

Leah C. Lively, Jeremy S. Healey, Lane Powell, P.C., Portland, OR, for Defendant.

### BACKGROUND

In November 2006, Plaintiff Deanna Bettencourt began full-time employment for Defendant Brookdale Senior Living Communities, Inc., as a resident assistant at a facility known as Wynwood of Mt. Hood. On February 27, 2007, it appears Plaintiff signed a document provided by Defendant titled Employment Binding Arbitration Agreement,<sup>1</sup> which Defendant required as a condition of Plaintiff's continued employment. The Agreement requires the parties to submit certain claims that might arise out of their employment relationship to confidential, "mandatory binding arbitration." Section 1(a) of the Agreement requires arbitration of

any claim that could be asserted in court or before an administrative agency or claims for which you have an alleged cause of action, including without limitation ... claims for discrimination ... claims for wrongful discharge ... and/or claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, and whether based on statute or common law.

Although the Agreement contains a signature block for execution by one of Defendant's "Company Representatives," the signature block is blank, and it appears Defendant did not execute the Agreement.

Defendant terminated Plaintiff's employment in June 2009. On September 1, 2009, Plaintiff filed a complaint in Multnomah County Circuit Court. On October 9, 2009,

Defendant removed the matter to this Court based on the Court's diversity jurisdiction under and pursuant to 28 U.S.C. §§ 1332, 1441, 1446.

On October 13, 2009, Defendant filed a Motion to Compel Arbitration in which it requests this Court to order arbitration pursuant to the Agreement and to stay this matter pending the outcome of arbitration.

On October 16, 2009, Plaintiff filed her First Amended Complaint in which she asserts state-law claims for (1) earned but unpaid wages and penalties wages, (2) unlawful discrimination/retaliation on the basis of her wage claim, and (3) wrongful discharge. Plaintiff filed a Motion for Partial Summary Judgment on November 9, 2009, in which she requests this Court to grant summary judgment as to her Claim One for penalty wages under Oregon Revised Statute § 652.150.

On November 17, 2009, Defendant filed a Motion to Extend the Deadline to Respond to Plaintiff's Motion for [Partial] Summary Judgment requesting this Court to decide Defendant's Motion to Compel Arbitration before requiring it to file a response to Plaintiff's Motion. The Court granted Defendant's Motion to Extend and struck the briefing schedule as to Plaintiff's Motion for Partial Summary Judgment pending the Court's resolution of Defendant's Motion to Compel Arbitration.

### STANDARDS

\*2 The FAA was enacted to "advance the federal policy favoring arbitration agreements." *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1217 (9th Cir.2008). The FAA provides arbitration agreements generally "shall be valid, irrevocable, and enforceable." *Id.* See also 9 U.S.C. § 2. The court must "rigorously enforce" arbitration agreements and "must order arbitration if it is satisfied that the making of the agreement for arbitration is not in issue." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir.1999)(citing *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)). Accordingly, the court's task is to "determine (1) whether a valid agreement to arbitrate exists, and, if it does, (2) whether the agreement encompasses the dispute at issue." *Lowden*, 512 F.3d at 1217 (citation omitted). See also *Simula*, 175 F.3d at 720.

If the court determines there are unresolved issues of fact as to the formation of the arbitration agreement, the court must "proceed summarily" to a jury trial on the merits. 9 U.S.C. § 4. See *Sanford v. Memberworks, Inc.*, 483 F.3d

956, 962 (9th Cir.2007). If the court determines the matter is subject to arbitration, it may either stay the matter pending arbitration or dismiss the matter. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). See also 9 U.S.C. §§ 3, 4.

### DISCUSSION

In its Motion to Compel Arbitration, Defendant contends the Agreement is a valid, written, and enforceable agreement between the parties to arbitrate Plaintiff's claims pursuant to the FAA, and, therefore, the Court must order the parties to pursue this matter in binding arbitration. In her Response, Plaintiff challenges Defendant's Motion on the grounds that: (1) the Agreement is not subject to the FAA; (2) an agreement to arbitrate Plaintiff's claims was not formed between the parties; (3) even if such an agreement were formed, it is not enforceable; and (4) Plaintiff should be permitted to litigate her equitable claims in this Court even if her statutory claims are referred to arbitration.

#### I. The Federal Arbitration Act governs the Agreement.

Plaintiff contends this Agreement is not subject to the FAA because Plaintiff was hired, performed all of her work, and was fired within the state of Oregon, and, therefore, the parties did not engage in interstate commerce, which is a necessary requirement for the FAA to apply.

Section Two of the FAA provides a "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA broadly applies to arbitration agreements involving "commerce among the several States or with foreign nations" or territories. 9 U.S.C. § 1. The Supreme Court has interpreted the phrase "involving commerce" as it is used in the FAA as the functional equivalent of the phrase "affecting commerce," signaling "Congress's intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-76, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). The Court found this broad interpretation consistent with the purpose of the FAA, which is to put arbitration agreements on an equal footing with other contracts. *Id.* at 274-77. This interpretation is also consistent with the Supreme Court's prior interpretations of the FAA. *Id.* Thus, the Court adopted a

“commerce-in-fact” test to determine whether the contract involves interstate commerce. *Id.* at 281.

\*3 As Defendant points out, the Supreme Court has expressly held “[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA.” *Waffle House*, 534 U.S. at 289. *See also Adams*, 532 U.S. at 113–24 (upholding the Court’s interpretation in *Allied–Bruce*). Thus, the Agreement, if properly formed, is an employment contract subject to the FAA if it, in fact, involves or affects interstate commerce.

Defendant notes it is an assisted-living service provider engaged in interstate commerce with operations in multiple states including Oregon, Wisconsin, Tennessee, and Illinois. In *Allied–Bruce*, the Court considered the multi-state character of Terminix and Allied–Bruce when it concluded the contract at issue was subject to the FAA. 513 U.S. at 281. As noted, the Court must interpret the FAA’s applicability to the broadest extent of Congress’s power under the Commerce Clause. Thus, even if Plaintiff’s assertion that *her employment* with Defendant did not involve interstate commerce, which the Court notes is not supported by any evidence in the record and is unlikely if one considers the economic effects of Plaintiff’s employment in the aggregate, the multi-state nature of Defendant’s business, nonetheless, establishes Plaintiff’s employment arbitration contract with Defendant involves or affects interstate commerce. The Court, therefore, concludes the Agreement is subject to the FAA because the Agreement, if properly formed, is a “contract evidencing a transaction involving commerce” under FAA §§ 1 and 2.

**II. On this record, whether the parties entered into the Agreement to arbitrate is an issue for a jury to determine.**

Plaintiff contends the parties did not form an agreement to arbitrate her claims on the grounds that there was a lack of consideration based on the “nonmutual” nature of the Agreement and a lack of assent by Defendant to the terms of the Agreement.

Although the FAA promotes a clear policy favoring agreements to arbitrate disputes, the court must make a threshold determination as to whether a contract was in fact formed. *See, e.g., Simula*, 175 F.3d at 719–20; *Lowden*, 512 F.3d at 1217. The court, therefore, must first determine whether an arbitration agreement that was provided to an existing employee as a mandatory policy and condition of the employee’s continued employment forms a binding contract when the employee signed it but the employer failed to do so despite express terms in the

agreement requiring the signature of a representative of the employer.

Here the Court must apply Oregon contract law to resolve questions concerning formation of the Agreement. *See Lowden*, 512 F.3d at 1217. *See also First Options*, 514 U.S. at 944. Under § 4 of the FAA, “[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.”<sup>9</sup> U.S.C. § 4. *See Sanford*, 483 F.3d at 962.

\*4 Plaintiff contends the Agreement requires only Plaintiff to bring her claims in arbitration and reserves Defendant’s right to bring its claims against an employee in court. As a result, Plaintiff contends the terms of the Agreement are so “nonmutual” as to lack consideration.

Under the Agreement’s provision for “Claims Covered,” however, Defendant promised to arbitrate certain claims in exchange for Plaintiff’s promise to arbitrate certain claims. Defendant’s promise included forgoing litigation of any tort, breach-of-contract, or breach of confidentiality and trade-secret claims against Plaintiff. Moreover, as a condition of Plaintiff’s employment, Defendant maintained Plaintiff’s at-will employment in exchange for her assent to the Agreement, which is additional consideration as reflected in the second paragraph of the Agreement. In any event, strict mutuality of obligation is not required in an arbitration agreement; *i.e.*, only “sufficient consideration” is required to support an arbitration agreement. *Motsinger*, 211 Or.App. at 619–22, 156 P.3d 156. Here the Court concludes the Agreement required Defendant to provide sufficient consideration to support the formation of a contract with Plaintiff.

Plaintiff also contends the Agreement was never actually formed because Defendant did not assent to the Agreement by signing it. Although Plaintiff stated in her Declaration in support of her Response that “it appears that I signed the so-called ‘agreement’ on February 27, 2007,” and, indeed, Plaintiff’s signature undisputedly appears to be on the Agreement, Defendant did not sign the Agreement even though the Agreement itself expressly requires the signature of Defendant’s representative. For example, the first page of the Agreement provides: “After we sign this Agreement, we both will be precluded from bringing or raising in court or another forum any dispute that was or could have been brought or raised under the procedures set forth in this agreement.” The Agreement also provides:

By the provision of [Bettencourt’s]

signature below, [Bettencourt] indicate [s][her] agreement to the terms set forth above. By the provision of the signature of our Representative named below, we indicate our agreement, as well, to the terms set forth in this Procedure.

Nonetheless, as noted, a representative of Defendant did not sign the Agreement.

Defendant contends its signature is not required to create a binding arbitration agreement under Oregon or federal law. Indeed, § 2 of the FAA only requires an arbitration agreement to be written and does not expressly require it to be signed. 9 U.S.C. § 2. Moreover, Oregon law does not necessarily require a signature to create a contract. *See Western Bank v. Morrill*, 245 Or. 47, 420 P.2d 119 (1966)(a signature is not required to create a binding agreement when other manifestations of assent are present). Defendant, however, has not cited any authority to support its contention that its signature is not required to form a binding arbitration agreement when the written agreement Defendant drafted expressly required its signature as a means to demonstrate Defendant's assent and to create a contractual obligation.

\*5 Instead, Defendant contends the text of the Agreement as a whole reflects Defendant's assent to be bound by the Agreement. For example, in the prefatory language of the Agreement addressed to the employee, the Agreement provides: "In exchange for your agreement to submit these disputes to binding arbitration, we likewise agree to the use of arbitration as the exclusive forum for resolving employment disputes covered by this Agreement." Defendant cites the Restatement (Second) of Contracts § 27 (1981) for the proposition that "manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof." The parties, however, have not asserted as set out in Restatement § 27 that they first assented to the terms of the Agreement and then agreed to prepare and to adopt a written memorial of that agreement. Moreover, the Court cannot lightly ignore the written terms of the Agreement.

To support her position, Plaintiff cites, in turn, to the Restatement (Second) of Contracts § 26 (1981), which provides:

A manifestation of willingness to enter into a bargain is not an offer

if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

Plaintiff contends the Agreement does not even constitute an offer to contract because it did not vest in Plaintiff the power to conclude the bargain; for example, according to the Agreement itself, it only becomes operative "[a]fter [Defendant] sign[s] this Agreement."

In light of the terms of the Agreement that required Defendant's signature to demonstrate its assent, the absence of an explanation for the lack of signature, and Defendant's contention that other indicia of its assent, including language in the Agreement demonstrating its present intent to be bound by the Agreement, were sufficient to form a contract, the Court cannot, on this record, conclusively determine whether the parties formed a contract. In other words, a question of fact exists with respect to the formation of the Agreement.

As noted, under § 4 of the FAA, when an issue of fact exists as to the formation of an agreement to arbitrate, the Court must summarily proceed to a jury trial on the issue. The Court, therefore, cannot resolve Defendant's Motion to Compel Arbitration until a jury determines whether the parties actually formed a contract.

### III. Enforceability of the Agreement.

Even if a jury finds the parties formed an agreement to arbitrate, Plaintiff argues this Agreement is, in any event, unenforceable under Oregon law on the grounds that (1) it violates Oregon Revised Statute § 36.620(5), (2) it is void "as against public policy," and (3) it is unconscionable. The Court notes resolution of the issue of contract formation at trial would be unnecessary if the Agreement is otherwise unenforceable. The Court, therefore, in the interest of judicial economy, addresses Plaintiff's enforceability arguments.

\*6 Plaintiff contends the Agreement is unenforceable under Oregon law because "arbitration is a matter of contract," and courts must "place arbitration agreements on equal footing with other contracts." *Waffle House*, 534 U.S. at 293. Accordingly, when grounds "exist at law or in equity for the revocation of any contract," courts may decline to enforce arbitration agreements. 9 U.S.C. § 2. *See also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Ferguson v. Countrywide Cred. Indus., Inc.*, 298 F.3d

778, 782 (9th Cir.2002). To evaluate the validity of an arbitration agreement, federal courts must “apply ordinary state-law principles that govern the formation of contracts.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). See also *Cir. City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir.2002)(federal courts must apply the law of the forum state to determine whether an arbitration agreement is enforceable).

Thus, the Court must interpret and apply Oregon law as the Oregon Supreme Court would apply it. See *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 473 (9th Cir.2001). If no decision by the Oregon Supreme Court is available to guide the Court’s interpretation of state law, the Court must predict how the Oregon Supreme Court would decide the issue by using intermediate appellate state-court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. *Id.* If “there is relevant precedent from the state’s intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state’s supreme court likely would not follow it.” *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir.2009)(quoting *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir.2007)).

**A. Oregon Revised Statute § 36.620(5) is preempted by the FAA.**

Plaintiff contends the Agreement is unenforceable under Oregon law. Oregon Revised Statute § 36.620(5) provides:

A written arbitration agreement entered into between an employer and employee and otherwise valid under subsection (1) of this section is voidable and may not be enforced by a court unless:

(a) The employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee’s employment that an arbitration agreement is required as a condition of employment; or

(b) The arbitration agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.

Thus, Plaintiff asserts in her Response that any such agreement made during her employment with Defendant must have been accompanied by a promotion to be an enforceable agreement under Oregon Revised Statute §

36.620(5)(b). Defendant did not respond to this argument in its Reply other than to assert that federal law controls.

\*7 To resolve this issue, the Court must determine whether Oregon law may render an arbitration agreement unenforceable on bases other than general legal or equitable grounds for revocation of a contract. As noted, the FAA provides a written agreement to arbitrate a dispute “evidencing a transaction involving commerce ... 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 question is whether the FAA preempts the ability of states to create additional conditions of enforceability beyond the FAA’s requirements for arbitration agreements.

In *Doctor’s Associates, Inc. v. Casarotto*, the United States Supreme Court addressed this question with respect to a Montana statute that required arbitration agreements to include a typed, underlined notice in all capital letters on the first page to be enforceable. 517 U.S. 681, 684, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). The Supreme Court held: “[c]ourts may not ... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions” because the FAA requires arbitration provisions to be placed on “the same footing as other contracts.” *Id.* at 687 (quoting *Scheck v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). The Court, therefore, held the FAA preempted the Montana statute because the FAA only allows states to invalidate arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract” and the Montana statute’s requirement was specific to arbitration agreements. *Id.* at 687–88.

Here Oregon Revised Statute § 36.620(5) only renders unenforceable arbitration agreements that would otherwise be enforceable under the FAA. Section 36.620(5), therefore, is contrary to the “goals and policies” of the FAA because it singles out arbitration contracts “in a class apart from ‘any contract.’” See *Doctor’s Assocs.*, 517 U.S. at 688. Thus, the FAA preempts Oregon Revised Statute § 36.620(5), and, as a result, § 36.620(5) is not a valid basis for concluding the Agreement is unenforceable.

**B. The Agreement is not “void as against public policy.”**

Plaintiff also contends the Agreement is unenforceable because its confidentiality provision is against the public policy favoring open litigation of employment-related disputes.

Under Oregon law, a contract that is against public policy will not be enforced. *Hendrix v. McKee*, 281 Or. 123, 128, 575 P.2d 134 (1977). The Oregon Supreme Court has held:

If the consideration for the contract or its agreed purpose is illegal or against public policy on its face, it will not be enforced. If the contract on its face is not illegal or against public policy, as in the present case, the [party asserting the contract's illegality] assumes the burden of alleging and proving its illegality.... In addition, if the contract is merely promotive of activities which are either illegal or against public policy, a weighing of conflicting public policies is required.

\*8 *Id.*

The Agreement includes a provision for a "final binding confidential arbitration." Plaintiff maintains part of the Oregon employment-law scheme is to create a deterrent effect on businesses by using a public judicial forum to vindicate employees' rights. Thus, Plaintiff argues confidential arbitration of an employment dispute is against public policy because it diminishes the deterrent effect on employers and also loses its precedential effect. Plaintiff, however, does not cite any Oregon authority that sets out this public policy, that expresses the relative importance of the deterrent effect of nonconfidential resolutions of employment disputes, or that identifies confidential resolutions of employment disputes as violations of public policy.

Defendant, in turn, maintains confidential arbitration provisions are common and contends a strong public policy exists that favors the enforcement of private agreements. *See, e.g., Bliss v. S. Pac. Co.*, 212 Or. 634, 646, 321 P.2d 324 (1958). Moreover, the Oregon Supreme Court has long recognized the important public policy favoring freedom of contract:

It is axiomatic that public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice; and it

is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced.

*In re Marriage of McDonald*, 293 Or. 772, 779, 652 P.2d 1247 (1982)(quoting *Eldridge v. Johnston*, 195 Or. 379, 405, 245 P.2d 239 (1952)).

Under the Agreement, the arbitration process provides Plaintiff with an avenue to pursue the legal rights she is afforded under Oregon and federal law and grants the arbitrator the full remedial authority that a court or an administrative agency would have to vindicate Plaintiff's rights. Moreover, if the arbitrator found in favor of Plaintiff in a confidential arbitration, the decision would likely have the same deterrent effect on Defendant as it would if this Court resolved the matter. Thus, the Court concludes the fact that arbitration under the Agreement would be confidential does not sufficiently undermine the public policy served by Oregon statutes to justify finding this Agreement void as against public policy.

The Court notes the only deterrent effect that might be sacrificed by a confidential arbitration if Plaintiff prevailed is the effect of published precedent on other companies in Oregon. Oregon law, however, does not limit the private right to settle an employment dispute confidentially outside of a courtroom, which suggests the policy favoring the freedom of individuals to contract is more highly valued than the deterrent effect that results from public resolution of such matters. Moreover, the Oregon Court of Appeals has previously upheld the confidentiality provision in an arbitration agreement in the face of a plaintiff's argument that the provision is unfair and unconscionable. *See Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or.App. 553, 575, 152 P.3d 940 (2007). In doing so, the court noted confidentiality provisions in arbitration agreements are common. *Id.* at 575 n. 6, 152 P.3d 940.

\*9 Thus, Plaintiff has not met her burden to show that a basis exists for the Court to conclude the Agreement is unenforceable because its confidentiality provision "contravenes some 'over-powering rule of public policy.'" *See Compton v. Compton*, 187 Or.App. 142, 148, 66 P.3d 572 (2003)(quoting *Eldridge v. Johnston*, 195 Or. 379, 405, 245 P.2d 239 (1952)).

### C. The Agreement is not unconscionable.

Plaintiff also contends the Agreement is unenforceable because it is both procedurally and substantively

unconscionable.

“[U]nconscionability is a generally applicable contract defense that may render an agreement to arbitrate unenforceable.” *Chalk*, 560 F.3d at 1092 (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 981 (9th Cir.2007)). “The party asserting unconscionability bears the burden of demonstrating that the arbitration clause in question is, in fact, unconscionable.” *Motsinger v. Lithia Rose-FT, Inc.*, 211 Or.App. 610, 614, 156 P.3d 156 (2007) (citing *W.L. May Co., Inc. v. Philco-Ford Corp.*, 273 Or. 701, 707, 543 P.2d 283 (1975)). Whether a contract is unconscionable is a “question of law that must be determined based on the facts in existence at the time the contract was made.” *Motsinger*, 211 Or.App. at 614, 156 P.3d 156. The determination as to whether a free-standing arbitration agreement is unconscionable is for the court to determine. See *Jackson v. Rent-A-Center West, Inc.*, 581 F.3d 912, 916 (9th Cir.2005).

“In Oregon, the test for unconscionability has two components—procedural and substantive.” *Motsinger*, 211 Or.App. at 614, 156 P.3d 156 (citing *Vasquez-Lopez*, 210 Or.App. at 556, 152 P.3d 940). “Procedural unconscionability refers to the *conditions* of contract formation, and substantive unconscionability refers to the *terms* of the contract.” *Id.* (citation omitted; emphasis in original). “Although both forms of unconscionability are relevant, ... only substantive unconscionability is absolutely necessary.” *Chalk*, 560 F.3d at 1093 (quoting *Vasquez-Lopez*, 210 Or.App. at 567, 152 P.3d 940)(quotation omitted).

#### 1. Procedural unconscionability.

Plaintiff asserts the Agreement is procedurally unconscionable because there was a vast disparity of bargaining power between Plaintiff and Defendant and Defendant did not explain the Agreement to Plaintiff, negotiate its terms with Plaintiff, or “offer Plaintiff legal counsel.” Plaintiff also contends oppression and surprise in the formation of the Agreement render it procedurally unconscionable. Specifically, Plaintiff notes the Agreement was a “take-it-or-leave-it” condition of her employment that was not an issue for negotiation, which demonstrates the unequal bargaining power between Plaintiff and Defendant.

As noted, “[p]rocedural unconscionability refers to the *conditions* of contract formation.” *Motsinger*, 211 Or.App. at 614, 156 P.3d 156 (emphasis in original). The inquiry into procedural unconscionability focuses in part on the factor of oppression.

Oppression arises when there is inequality in bargaining power between the parties to a contract, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice.

\*10 *Id.* “[A] contract of adhesion—an agreement presented on a take-it-or-leave-it basis—reflects unequal bargaining power...” *Chalk*, 560 F.3d at 1094 (citing *Motsinger*, 211 Or.App. at 615, 156 P.3d 156). In *Motsinger*, however, the Oregon Court of Appeals held unequal bargaining power is insufficient alone to invalidate an arbitration clause without some evidence of deception, compulsion, or unfair surprise. *Id.* at 615–17, 156 P.3d 156.

The record reflects Plaintiff was required to sign the Agreement as a condition of continued employment, and, therefore, the Agreement is an adhesion contract. Accordingly, the contract is the product of unequal bargaining power between the parties. In *Chalk*, however, the Ninth Circuit concluded “the take-it-or-leave-it nature of [a contract] is insufficient to render it unenforceable” on the basis of procedural unconscionability when the arbitration clause “was not hidden or disguised and where the plaintiff was given time to read the documents before assenting to their terms.” 560 F.3d at 1094 (citation omitted). Plaintiff does not contend she was coerced or deceived when she entered into the Agreement, and she acknowledges she signed it and returned it to Defendant after Defendant provided her with the Agreement. “A party is presumed to be familiar with the contents of any document that bears the person’s signature.” *Id.* at 616–17. Accordingly, although the adhesive characteristic of the Agreement “reflects unequal bargaining power,” that alone is not sufficient to render it unenforceable. See *Chalk*, 560 F.3d at 1094 (citation omitted).

Plaintiff also asserts there were “tricky” terms in the Agreement that were unfairly surprising to her such as the cost burden on Plaintiff, the lack of mutual terms, and the claim-notice requirement. Such provisions, however, are not a basis for finding “unfair surprise” under these circumstances because these provisions were not hidden from Plaintiff and were apparent from the face of the Agreement. See *Motsinger*, 211 Or.App. at 614, 156 P.3d 156. These arguments, however, are relevant to the fairness of the terms of the Agreement, which the Court will consider when evaluating substantive unconscionability.

## 2. Substantive unconscionability.

Under Oregon law, “the emphasis is clearly on substantive unconscionability.” *Vasquez-Lopez*, 210 Or.App. at 569, 152 P.3d 940. See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). The Court must determine whether the arbitration clause is substantively unconscionable in light of the unequal bargaining power between the parties.

Plaintiff contends the arbitration clause is substantively unconscionable because (1) the cost-allocation provision is unfairly burdensome, (2) the Agreement is unfairly balanced in Defendant’s favor, (3) the required claim notice constitutes overreaching, (4) the small panel of arbitrators is insufficient to ensure a fair resolution, and (5) the “repeat-player” effect unfairly favors Defendant in the arbitral forum.

\*11 The nature of an adhesion contract reflects “an underlying inequality in the parties’ ability to bargain.” *Chalk*, 560 F.3d at 1094. The Court, therefore, must consider whether that disparity in bargaining power “ ‘is combined with terms that are unreasonably favorable to the party with the greater power’ “ to determine whether the Agreement is substantively unconscionable. *Id.* (quoting *Motsinger*, 211 Or.App. at 617, 156 P.3d 156).

### a. Cost-allocation provision.

Plaintiff contends the cost-allocation provision of the arbitration clause is unconscionable because it is prohibitively expensive. The cost-allocation provision in the Agreement provides:

The parties agree that the costs of the AAA administrative fees and the arbitrator’s fees and expenses, will be paid for us initially, but as provided by statute or decision of the arbitrator. In other words, all costs could after all is complete be [*sic*] paid by us or you, depending on the outcome. All other costs and expenses associated with the arbitration, including, without limitation, the party’s respective attorneys’ fees, shall be borne by the party incurring the expense, unless provided otherwise by statute or decision of the arbitrator.

“An arbitration agreement is unenforceable under the FAA if it denies the litigant the opportunity to vindicate his or her rights in the arbitral forum.” *Vasquez-Lopez*, 210 Or.App. at 573, 152 P.3d 940 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)). In *Motsinger*, the Oregon Court of Appeals analyzed the following factors to determine whether a cost-sharing provision in an arbitration clause denied a plaintiff vindication of her rights and, therefore, was unconscionable:

- (1) [W]hether plaintiff will bear any costs at all in the arbitration,
- (2) if so, what those costs would be, and
- (3) what deterrent effect, if any, those potential costs would have on plaintiff’s ability to bring an action to vindicate her rights.

211 Or.App. at 618, 156 P.3d 156.

Oregon courts “will not invalidate [an] arbitration clause simply because of the possibility that plaintiff, if she were to lose, would bear some undetermined costs of arbitration.” *Motsinger*, 211 Or.App. at 618, 156 P.3d 156. See also *Vasquez-Lopez*, 210 Or.App. at 574, 152 P.3d 940 (an arbitration clause is not rendered substantively unconscionable because of the mere possibility that the plaintiff would have to bear a prohibitive amount of costs). “Denial of access to an arbitral forum occurs when the cost of arbitration is large in absolute terms, but also, comparatively, when that cost is significantly larger than the cost of a trial.” *Vasquez-Lopez*, 210 Or.App. at 574, 152 P.3d 940. In addition, the party who asserts an arbitration clause is invalid on the ground that a cost-sharing provision renders the arbitration clause unconscionable bears the burden of showing the likelihood of incurring such costs. *Motsinger*, 211 Or.App. at 617–18, 156 P.3d 156. See also *Green Tree*, 531 U.S. at 92. If the plaintiff does not offer any evidence of the “likely costs of arbitration or the potential impact of those costs on her,” a court cannot adequately assess the costs the plaintiff will bear and the “deterrent effect, if any, those costs would have on [a] plaintiff’s ability to bring an action to vindicate her rights.” *Motsinger*, 211 Or.App. at 618, 156 P.3d 156. See also *Vasquez-Lopez*, 210 Or.App. at 574, 152 P.3d 940.

\*12 Plaintiff asserts the cost-allocation provision is so expensive that it denies her access to the arbitral forum because she would have to pay all initial expenses under the Agreement including the arbitrator’s fees and expenses and might ultimately bear the entire expense of the arbitration.

With respect to the risk that Plaintiff may bear all costs of the arbitration, the Agreement does not identify who will absolutely bear the costs of the arbitration. The Agreement leaves that determination to the arbitrator based on the outcome of the arbitration. Under Oregon law, as noted, the mere risk that a party may bear the costs of arbitration is not sufficient to render an arbitration agreement substantively unconscionable. *Vasquez-Lopez*, 210 Or.App. at 574, 152 P.3d 940. Plaintiff, nevertheless, cites to *Vasquez-Lopez* because the court in that case found the cost of arbitration would be a strong deterrent to the plaintiff's vindication of her rights in the arbitral forum. The arbitration clause in *Vasquez-Lopez*, however, required the parties to split the costs of the first day of the arbitration and the plaintiff to pay all of the remaining costs of the arbitration. *Id.* at 574-75, 152 P.3d 940. Here the Court cannot determine whether Plaintiff would actually bear any costs beyond the initial costs under the Agreement. Thus, if the Court found the cost-allocation provision to be unconscionable on this ground, the Court would be invalidating the Agreement on the basis of mere speculation. See *Motsinger*, 211 Or.App. at 618, 156 P.3d 156.

In any event, Plaintiff asserts even the initial cost of the "AAA administrative fees and the arbitrator's fees and expenses" would be prohibitive for Plaintiff. She contends those initial costs would include her filing fee, the employer's filing fee, and the arbitrator's fees and expenses. Defendant, however, contends these "initial" fees will only amount to a filing fee of \$150 for Plaintiff's claim.

The Court acknowledges the cost-allocation provision in the Agreement is poorly written. Although the initial clause provides "AAA administrative fees and the arbitrator's fees and expenses, will be paid for us initially," that clause does not expressly identify Plaintiff as the party responsible for paying such fees and expenses. In fact, the Agreement indicates twice that the costs associated with the arbitration are to be allocated "as provided by statute or the decision of the arbitrator."

Both parties refer to the American Arbitration Association (AAA) rules<sup>3</sup> for employer-promulgated arbitration agreements, which are "incorporated by reference into [the arbitration] Procedure." The AAA rules require a filing fee of \$175 for an employee filing a claim. Under the AAA rules, that cost would be borne by Plaintiff. The filing fee for the employer is \$925 and, according to the rules, "is payable in full by the employer, unless the plan provides that the employer pay more." Moreover, the AAA rules require the employer to pay the \$325 per-day

fee for hearings before the arbitrator. The rules also provide "all expenses of the arbitrator, including required travel and other expenses, and any AAA expenses ... shall be borne by the employer." These cost-allocation rules are consistent with Plaintiff's argument in her memorandum that "[t]he AAA recognizes that costs can invalidate employment arbitration agreements, so it normally caps the filing fee for the employee at \$150" (even though Plaintiff's filing fee is apparently now \$175). The AAA rules are also consistent with Defendant's statement in its Reply that Plaintiff is responsible for her filing fee under the Agreement and Defendant is responsible for its filing fee together with all other costs, expenses, and fees determined by the AAA rules, applicable statutes, and the arbitrator.

\*13 The Agreement further provides: "Any conflict between the rules and procedures set forth in the AAA rules and those set forth in this Agreement shall be resolved in favor of those in this Agreement ." Plaintiff contends the Agreement overrides the AAA rules and assigns "AAA administrative fees and the arbitrator's fees and expenses" to Plaintiff. Considering the Agreement as a whole and in light of its incorporation of AAA rules, however, the Court concludes there is not a conflict between the Agreement and AAA rules as to Plaintiff's payment of fees and expenses. The Agreement only requires Plaintiff to pay her filing fee, which is less than the fee for filing an action in federal court (\$350 in this district) and for Multnomah County Circuit Court where Plaintiff originally filed this action (\$189 at that time). Defendant must pay all other "initial" fees as required by the AAA rules. Any remaining fees, costs, and expenses will be determined by AAA rules, applicable statutes, and the decision of the arbitrator in accordance with the Agreement.

Accordingly, the Court concludes on this record that Plaintiff has not shown the cost-allocation provision of the Agreement conflicts with AAA rules by requiring Plaintiff initially to pay more than her filing fee. The cost-allocation provision, therefore, is not substantively unconscionable.

#### **b. Imbalance of terms.**

Plaintiff also maintains the Agreement is substantively unconscionable because it is effectively unilateral. Specifically, Plaintiff asserts the Agreement allows the "employer [to] go to court, but the employee may not go to court." Thus, Plaintiff contends Defendant did not give consideration in exchange for Plaintiff's promise to submit to arbitration.

Under Oregon law, the court determines whether an agreement is so unbalanced as to be unconscionable on a case-by-case basis. *Motsinger*, 211 Or.App. at 625, 156 P.3d 156. The Oregon Court of Appeals found in *Motsinger* that “[g]iven the public policy favoring arbitration as a forum for dispute resolution, and Supreme Court case law recognizing the adequacy of that forum, we are reluctant to conclude that a unilateral agreement to arbitrate is inherently unconscionable in all cases.”*Id.* at 624–25, 156 P.3d 156.

In the Agreement’s provision for “Claims Covered,” the parties mutually agree to a list of claims that must be resolved through arbitration and waive the right to resolution by a jury. Just as Defendant could demand arbitration of those claims, Plaintiff could demand arbitration of any tort claim, breach-of-contract claim, or breach of confidentiality or trade secrets that Defendant might bring against Plaintiff. In addition, the claims that are expressly excepted from mandatory arbitration in the Agreement are primarily claims that Plaintiff might bring (for example, unemployment-benefits claims, workers’ compensation claims, and claims before the Equal Employment Opportunity Commission). Moreover, claims for injunctive or equitable relief are mutually excepted.

\*14 The Court, therefore, concludes on this record that the terms of the Agreement are sufficiently balanced and are not so lacking in mutuality as to be substantively unconscionable.

**c. Claim-notice provision.**

Plaintiff also contends the Agreement’s claim-notice provision is substantively unconscionable because it requires too much pre-claim notice from an employee. The claim-notice provision of the Agreement requires the aggrieved party to provide

written notice of any claim to the other party as soon as possible after the aggrieved first knew, or should have known, the facts giving rise to the claim. The written notice shall describe the nature of all claims asserted and the facts upon which those claims are based ... within any statute of limitations as set forth in the law of the [forum] state.

Plaintiff contends this provision is too onerous for her and other employees who are not familiar with the law and

who may not know “all” of their claims or “all” of the facts giving rise to such claims before the start of discovery.

The Court notes the claim-notice provision does not shorten the statute of limitations provided by state law, does not provide for exclusion of claims that an employee fails to set out in the notice, and does not alter pleading rules that would prevent a party from adding a claim or facts supporting new claims found during discovery. Furthermore, the claim-notice provision does not limit Plaintiff to providing a single notice to Defendant. If Plaintiff became aware of additional facts or claims after she met with counsel or following the completion of discovery, it appears she could supplement her notice to add facts or claims. Finally, these notice requirements are no more onerous than the state or federal pleading standards. *See, e.g.*, Or. R. Civ. P. 18A; Fed.R.Civ.P. 8(a).

Thus, the Court concludes on this record that the claim-notice provision of the Agreement is not substantively unconscionable.

**d. Designation of an arbitrator.**

Plaintiff contends requiring the parties to draw from the limited AAA panel of arbitrators is unconscionable because Plaintiff will not be able to secure a neutral and fair forum to resolve her claims. Plaintiff’s counsel, Jeff Merrick, stated in his Declaration in Opposition to Defense Motion that he contacted AAA and was informed there are four arbitrators on the employment-law panel in Portland, Oregon, but AAA would not disclose their names. Plaintiff, nevertheless, raises a number of questions about the potential for bias or conflicts of interest of hypothetical arbitrators. Plaintiff asserts she would “strike” an arbitrator who has past experience as an employment-defense attorney. Plaintiff’s counsel states: “I am concerned that I will not find an arbitrator with whom I am comfortable hearing my client’s case. The brief summaries sounded like these were employer and business-oriented people, not people people.”

The Court notes the Agreement provides the parties will jointly select an impartial arbitrator according to the AAA rules. The AAA rules provide the arbitrator will be a neutral with experience in employment law and without a personal or financial interest in the proceedings or a relationship with the parties that could create an appearance of bias. The procedure for selecting an arbitrator allows either party to strike arbitrators whom they find objectionable and to rate their preference for others. If the parties cannot agree to an arbitrator listed by AAA, AAA may designate another arbitrator from among

its panel.

\*15 In light of these options available to Plaintiff, the Court finds Plaintiff's objections to the AAA arbitration panel are speculative and concludes the AAA procedures are not unconscionable as to providing a neutral and fair arbitrator to resolve Plaintiff's claims.

**e. "Repeat-player" effect.**

Finally, Plaintiff asserts Defendant's experience as a "repeat player" with AAA in the arbitral forum gives it an advantage over a one-time litigant such as Plaintiff and, therefore, renders the Agreement unconscionable. Plaintiff cites findings from two law-journal articles that set out the repeat-players' advantages in the arbitral forum.

In one of the articles cited by Plaintiff, Lisa Bingham, the author, notes there are several measures that can be taken to counter the repeat-player effect. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L.Rev. 223, 256 (1998). For example, she states the AAA amended its rules to require potential arbitrators to disclose whether either party has previously selected them. *Id.* Indeed, the AAA rules require arbitrators to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." Thus, it appears that the risk is low that a prior relationship between Defendant and an arbitrator with the AAA would be an issue in this matter.

In effect, Plaintiff is requesting the Court to declare the arbitral forum inherently unconscionable on the basis of statistics that indicate plaintiffs are less successful in arbitration than in litigation. The Oregon Appellate Court, however, has held unconscionability of an arbitration agreement must be determined on its own particular facts, and the court eschewed *per se* rules of unconscionability in light of public policy at both the federal and state levels that support arbitration as an adequate forum for dispute resolution. *Motsinger*, 211 Or.App. at 624-25, 156 P.3d 156.

In summary, despite some inequality in the bargaining

Footnotes

<sup>1</sup> In her Declaration in Opposition to Defense Motions submitted with her Response, Plaintiff equivocates as to whether she signed the Agreement. In paragraph five of her Declaration, Plaintiff states "it appears that I signed the so-called 'agreement' on February

power of the parties, Plaintiff has not met her burden to show that the Agreement is so imbalanced against her as to render it substantively unconscionable under Oregon law. The Court, therefore, concludes if the parties, in fact, entered into an agreement to arbitrate, the Agreement is enforceable with respect to Plaintiff's challenges on that ground.

**IV. Plaintiff's equity claims.**

Plaintiff points out that the Agreement expressly excludes equitable remedies such as backpay and reinstatement and, therefore, Plaintiff should be permitted to pursue those equitable remedies in this Court rather than in arbitration even if the Court ultimately grants Defendant's Motion to Compel Arbitration of Plaintiff's statutory claims.

\*16 As noted, however, factual issues exist as to the valid formation and the precise terms of the Agreement. Any decision as to whether Plaintiff may litigate claims not covered by the Agreement, therefore, is premature, and the Court defers resolution of this issue until a verdict is rendered on the threshold issues.

**CONCLUSION**

For these reasons, the Court **DEFERS** ruling on Defendant's Motion pending trial as to whether the parties actually formed an arbitration agreement. The Court **DIRECTS** the parties to submit by February 1, 2010, a joint proposed expedited case-management plan for resolving the issue of the formation of the Employment Binding Arbitration Agreement. After the jury trial, the Court will determine how Plaintiff's Motion for Partial Summary Judgment (# 14) should be resolved. In preparing their joint proposal, the parties shall confer to evaluate whether there is any cost-effective basis to resolve the contract-formation dispute short of incurring the costs of an expedited jury trial, especially in light of the fact the parties still would need to incur the costs to resolve the merits of Plaintiff's Claims.

IT IS SO ORDERED.

27, 2007.”In paragraph six, however, Plaintiff indicates it is, in fact, her signature on the Agreement by stating: “My signature on the ‘agreement’ in February 2007 did not coincide with any promotion or advancement.”For purposes of this Motion only, the Court, therefore, concludes Plaintiff signed the Agreement.

<sup>2</sup> Section 4 provides a party alleged to have not complied with an arbitration agreement “may demand a jury trial.” In her Amended Complaint, Plaintiff made such a demand.

<sup>3</sup> The rules can be found at the American Arbitration Association website, [www.adr.org/drs](http://www.adr.org/drs).

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2014 WL 1338474

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.

In re Carrier IQ, Inc. Consumer Privacy Litigation.

No. C-12-md-2330 EMC | Signed March 28, 2014

**ORDER DENYING DEFENDANTS' MOTION TO  
COMPEL ARBITRATION**

**(Docket No. 129)**

EDWARD M. CHEN, United States District Judge

\*1 Plaintiffs (eighteen individuals from thirteen different states) have filed a consolidated amended class action complaint ("CAC" or "complaint") against the following Defendants:

- (1) Carrier IQ, Inc. ("CIQ");
- (2) HTC America, Inc. and HTC Corporation (collectively, "HTC");
- (3) Huawei Device USA, Inc.;
- (4) LG Electronics MobileComm U.S.A., Inc. and LG Electronics, Inc. (collectively, "LG");
- (5) Motorola Mobility LLC;
- (6) Pantech Wireless, Inc.; and
- (7) Samsung Telecommunications America, Inc. and Samsung Electronics Co., Ltd. (collectively, "Samsung").

All defendants, except for CIQ, are manufacturers of mobile devices (collectively, "Device Defendants" or "OEM Defendants"). Plaintiffs have asserted claims against Defendants pursuant to both federal and state law. Essentially, Plaintiffs' claims are for (1) unauthorized interception and transmittal of their private information and (2) breach of the implied warranty of merchantability.

Currently pending before the Court is a motion to compel arbitration, which has been brought by all Defendants

except Motorola.<sup>1</sup> For purposes of this order, the Court shall hereinafter refer to the moving defendants as "Defendants," even though Motorola is not a party to the motion.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **DENIES** the motion to compel arbitration.

**I. FACTUAL & PROCEDURAL BACKGROUND**

**A. Complaint**

As indicated above, Plaintiffs' claims against Defendants are, in essence, for (1) unauthorized interception and transmittal of their private information and (2) breach of the implied warranty of merchantability. The primary factual allegations underlying Plaintiffs' claims are as follows.

CIQ is the author and vendor of certain software which has the capability of intercepting and processing data on mobile devices. *See* CAC ¶ 63. The CIQ software is "ostensibly a network diagnostics tool." CAC ¶¶ 27, 41, 63.

Defendants maintain, and Plaintiffs do not materially dispute, that (1) three wireless carriers—namely, AT&T, Sprint, and Cricket—licensed the CIQ software from CIQ and that (2) the wireless carriers instructed the Device Defendants to install the software on the mobile devices they manufactured—which the wireless carriers or their agents would then sell to consumers in conjunction with the provision of wireless service. As a result, the CIQ software has been installed on millions of mobile devices, but without the knowledge of the vast majority of consumers. *See* CAC ¶ 41. In fact, "[t]he typical user has no idea that [the software] is running, nor can he or she turn it off." CAC ¶ 62.

\*2 "Though touted ... as a benign and simple service-improvement tool," the CIQ software has been used to intercept private information on mobile devices (e.g., user names, passwords, geo-location information, text messages, application purchases and uses) and transmit the same to others. *See* CAC ¶¶ 63–65. On the face of the CAC, it is not entirely clear who those others are. That is, it is not clear whether Plaintiffs are suing Defendants based on interception for and transmittal to the wireless carriers themselves or whether the alleged misconduct by Defendants consists of interception for and

transmittal to others—in particular, CIQ itself, the device manufacturers, Google, and application vendors or developers. *See, e.g.*, CAC ¶¶ 3, 61, 66 (alleging that “information is or has been transmitted to Google ... and probably to application vendors and developers, too, as part of device or application crash reports”; that information has been sent to CIQ’s servers or the servers of its customers; and that information is sometimes sent to device manufacturers which “specify which data they want from among that assembled pursuant to [specific] metrics”).

The Court asked Plaintiffs, at the hearing, to provide clarification. In response, Plaintiffs explained that they are *not* claiming any misconduct on the part of Defendants because of interception for/transmittal to the wireless carriers (*i.e.*, the wire carriers were essentially using the CIQ software for benign purposes only, namely, as a network diagnostics tool). Rather, Plaintiffs were bringing suit because, *e.g.*, CIQ and the Device Defendants were using the CIQ software to intercept private information for their own purposes (*i.e.*, not on behalf of the wireless carriers) and because this private information was being transmitted to Google and/or application vendors or developers as a result of device or application crash reports.

Aside from privacy issues, Plaintiffs maintain that the CIQ software is problematic because it

necessarily degrades the performance of any device on which it is installed. The CIQ software is always operating and cannot be turned off. It necessarily uses system resources, thus slowing performance and decreasing battery life. As a result, because of the CIQ software, in addition to having their private communications intercepted, plaintiffs and prospective class members are not getting the optimal performance of the mobile devices that they purchased, and which are marketed, in part, based on their speed, performance, and battery life.

CAC ¶ 74.

Based on, *inter alia*, the above allegations, Plaintiffs have asserted the following class claims:

(1) Violation of the Federal Wiretap Act, as amended

by the Electronic Communications Privacy Act (against CIQ and the Device Defendants).

(2) Violation of the Stored Communications Act (against CIQ only).

(3) Violation of the Computer Fraud and Abuse Act (against CIQ only).

(4) Violation of state wiretap and privacy acts (against CIQ and the Device Defendants).<sup>2</sup>

(5) Violation of state consumer protection acts (against CIQ and the Device Defendants).

(6) Violation of the Magnuson–Moss Warranty Act (against the Device Defendants only).

(7) Violation of the implied warranty of merchantability under state law (against the Device Defendants only).

## **B. Arbitration Agreements**

In the pending motion, Defendants ask that all of the above claims be compelled to arbitration. Defendants admit that they have no agreements themselves with Plaintiffs which contain an arbitration clause. However, Defendants point out that there are arbitration provisions in the agreements the wireless carriers (ATTM, Sprint, and Cricket) have with their own customers. According to Defendants, although Defendants are not signatories to these customer agreements, they have are entitled to invoke the benefit of the arbitration provisions based on an equitable estoppel theory. Below is the basic agreement to arbitrate for each wireless carrier.

### **1. ATTM**

\*3 ATTM’s Wireless Customer Agreement § 2.2 provides that “AT & T and you agree to arbitrate **all disputes and claims** between us.” Dobbs Decl., Ex. 2 (ATTM Agreement § 2.2).

The ATTM Agreement further provides that the arbitration agreement “is intended to be broadly interpreted [and] includes ... claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory.” Dobbs Decl., Ex. 2 (ATTM Agreement § 2.2).

### **2. Sprint**

Sprint's Terms and Conditions of Service ("Ts & Cs") provide that "[w]e each agree to arbitrate all Disputes between us." Miller Decl., Ex. B (Sprint 2011 Ts & Cs at 14). "Disputes" is defined to mean "any claims or controversies against each other related in any way to or arising out of in any way our Services or the Agreement, including, but not limited to, coverage, Devices, billing services and practices, policies, contract practices (including enforceability), service claims, privacy, or advertising." Miller Decl., Ex. B (Sprint 2011 Ts & Cs at 14). "Disputes" also include "claims related in any way to or arising out of in any way any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory." Miller Decl., Ex. B (Sprint 2011 Ts & Cs at 14). "The agreement to arbitrate is intended to be broadly interpreted." Miller Decl., Ex. B (Sprint 2011 Ts & Cs at 14).

### 3. Cricket

Cricket's Ts & Cs provide that

[a]ny past, present or future claim, dispute or controversy ... by either you or us against the other ... arising from or relating in any way to this Agreement or Services provided to you under this Agreement, including (without limitation) statutory, tort and contract Claims and Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved, upon the election by your or us, by binding arbitration.

Baughman Decl., Ex. 1 (Cricket Ts & Cs § 20(c)).

## II. DISCUSSION

Plaintiffs have offered two main arguments in opposition to the motion to compel arbitration: (1) because Defendants' equitable estoppel theory is not viable given the circumstances in this case and (2) because, even if the theory were viable, Plaintiffs never agreed to arbitration in the first place (formation) and the arbitration agreements are unconscionable. The Court need not address Plaintiffs' second argument because, even assuming in Defendants' favor that there are no formation or conscionability problems, the Court concludes that

Defendants cannot prevail on their equitable estoppel theory.

### A. Legal Standard

"[A]n agreement to arbitrate is a matter of contract: 'it is a way to resolve those disputes ... that the parties have agreed to submit to arbitration.'" *Chiron Corp. v. Ortho Diag. Sys.*, 207 F.3d 1126, 1130 (9th Cir.2000).

Because the wireless carrier customer agreements are contracts involving interstate commerce, the agreements are subject to the Federal Arbitration Act ("FAA"). *See id.*; *see also Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir.2013) (stating that, "[w]ith limited exceptions, the Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements in contracts involving interstate commerce"). Under the FAA, "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... 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.

\*4 For purposes of this opinion, the Court assumes that the arbitration agreements at issue are valid, irrevocable, and enforceable. The only question is *who* can compel arbitration—in other words, may Defendants compel arbitration as against the Plaintiffs even though Defendants are not signatories to the wireless carrier customer agreements containing the arbitration provisions they seek to enforce.

While generally, as a matter of federal law, doubts concerning the scope of arbitration should be resolved in favor of arbitration, where the issue is whether a particular party is bound by the arbitration agreement, the federal policy favoring arbitration does not apply. *See Rajagopalan v. Noteworld, LLC*, 718 F.3d 844, 847 (9th Cir.2013) (stating that the liberal federal policy regarding scope of arbitration does not apply to the question "whether a particular *party* is bound by the arbitration agreement").

Generally, the contractual right to compel arbitration "may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 744 (9th Cir.1993). Accordingly, "[t]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement."

*Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir.2013). Cf. *BG Group PLC v. Republic of Arg.*, No. 12–138, 2014 U.S. LEXIS 1785, at \*17 (Mar. 5, 2014) (noting that “courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about ‘arbitrability’ ” which “include questions such as ‘whether the parties are bound by a given arbitration clause’ ”).

As to the specific question here—*i.e.*, whether a non-signatory may enforce the arbitration agreements—the parties largely agree that the materials to be considered consists of the allegations in the operative complaint, along with the wireless carrier customer agreements themselves. See, e.g., *In re Apple iPhone 3G Prods. Liab. Litig.*, 859 F.Supp.2d 1084, 1096–97 (N.D.Cal.2012) (looking at the allegations in the complaint to determine whether plaintiffs had adequately alleged a basis for equitable estoppel). Although Defendants stated at the hearing that the Court should also consider the declarations submitted by both parties, those declarations largely focus on formation and conscionability issues, not the issue of equitable estoppel.

To the extent either party contends that this Court should apply a summary-judgment-type standard in evaluating the pending motion,<sup>3</sup> the Court questions whether that standard is entirely appropriate, especially because courts have generally employed that standard in deciding whether or not there was an agreement to arbitrate in the first place. That would be relevant to, e.g., formation but not equitable estoppel. See, e.g., *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir.1991) (indicating agreement with Third Circuit that, where there is a doubt as to whether an agreement to arbitrate exists, the matter should be submitted to a jury and “ ‘[o]nly when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement’ ”); *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796, 804 (N.D.Cal.2004) (Illston, J.) (indicating that, where a motion to compel arbitration “is opposed on the ground that no agreement to arbitrate was made,” a court should apply a standard similar to the Rule 56 summary judgment standard—*i.e.*, the court should give to the opposing party the benefit of all reasonable doubts and inferences that may arise and “[o]nly when there is no genuine issue of material fact concerning the formation of an arbitration agreement should a court decide as a matter of law that the parties did or did not enter into such an agreement”). Even if a summary-judgment-type standard were applicable, Defendants have the burden of establishing equitable estoppel, see *Just Film, Inc. v. Merch. Servs.*, No. C

10–1993 CW, 2011 U.S. Dist. LEXIS 96613, at \*24 (N.D.Cal. Aug. 29, 2011) (stating such in the context of arbitration and equitable estoppel), and, in light of that burden, allegations and facts must be resolved and construed in Plaintiffs’ favor.

#### **B. Equitable Estoppel**

\*5 Generally, one who is not signatory to an agreement has no right to enforce it.

[A]s a general matter, a contractual right to arbitration “may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration.” *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir.1993). However, there are legal theories, such as agency and estoppel, in which non-signatories to an arbitration agreement may compel or be compelled to arbitration. See *Murphy v. DirectTV, Inc.*, 724 F.3d 1218, 1229–34 (9th Cir.2013); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir.2006); *DMS Services, Inc. v. Superior Ct.*, 205 Cal.App. 4th 1345, 1353, 140 Cal.Rptr.3d 896 (2012).

*Xinhua*, 2013 WL 6844270, at \*5. Here, Defendants do not rely on agency or third-party beneficiary theories to compel arbitration pursuant to the agreements to which they are not signatories. Instead, they assert solely equitable estoppel as the ground for their ability to enforce arbitration.

Equitable estoppel is a doctrine that “precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.” *Murphy v. DirectTV, Inc.*, 724 F.3d 1218, 1229 (9th Cir.2013). Federal courts recognized that the doctrine of equitable estoppel could have applicability in the arbitration context. For example, in *Mundi v. Union Security Life Insurance Co.*, 555 F.3d 1042 (9th Cir.2009), the Ninth Circuit noted:

We have examined two types of equitable estoppel in the arbitration context. In the first, a nonsignatory may be held to an arbitration clause “where the nonsignatory ‘knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement.’ ” Under the second, a signatory may be required to arbitrate a claim brought by a nonsignatory “because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory’s obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations.”

*Id.* at 1046. Notably, while the Ninth Circuit acknowledged that equitable estoppel could apply in the arbitration context, it cautioned that, “in light of the general principle that only those who have agreed to arbitrate are obliged to do so, we see no basis for extending the concept of equitable estoppel of third parties in an arbitration context beyond the very narrow confines delineated in these two lines of cases.” *Id.*

After the Supreme Court’s decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), it is clear that state law, and not federal law, determines the applicability of equitable estoppel in the arbitration context.<sup>4</sup> *See Kramer*, 705 F.3d at 1128. And in two post-*Carlisle* cases, the Ninth Circuit has emphasized that the doctrine of equitable estoppel is a narrow one and should not be expanded, regardless of what underlying state law applies. *See, e.g., Murphy*, 724 F.3d at 1229 (in California case, stating that, “[b]ecause generally only signatories to an arbitration agreement are obligated to submit to binding arbitration, equitable estoppel of third parties in this

context is narrowly confined”); *Rajagopalan*, 718 F.3d at 847 (in Washington case, stating that “[w]e have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff, and we decline to expand the doctrine here”). Defendants have failed to point to any case law, federal or state, indicating to the contrary. Accordingly, the Court heeds the approach taken by the Ninth Circuit—*i.e.*, it shall consider whether equitable estoppel is appropriate under the narrow framework that has been recognized by the courts.

\*6 The chart below reflects the relevant state laws the narrow circumstances under which a nonsignatory to an agreement containing an arbitration clause can compel a signatory to the agreement to arbitration under an equitable estoppel theory.

| <b>A nonsignatory to an agreement containing an arbitration clause can compel a signatory to the agreement to arbitrate:</b> |   |                   |   |
|--|---|-------------------|---|
| <b>1</b>   | <b>Only under traditional equitable estoppel principles.</b>  | IL                | <i>Peach v. CIM Ins. Corp.</i> , 816 N.E.2d 668, 674 (Ill. Ct. App. 2004).  |
|  |   | MS                | <i>B.C. Rogers Poultry, Inc. v. Wedgeworth</i> , 911 So. 2d 483, 492 (Miss. 2005) (stating that, “[a]bsent allegations of substantially interdependent and concerted misconduct between a non-signatory and a signatory who have a close legal relationship,” traditional equitable estoppel law should apply) (emphasis added) |
| <b>2</b>   | <b>Only when the signatory seeks to enforce benefits under the agreement containing the arbitration clause.</b> | None <sup>5</sup> |   |

[Editor’s Note: The preceding image contains the reference for footnote<sup>3</sup>]

| <b>A nonsignatory to an agreement containing an arbitration clause can compel a signatory to the agreement to arbitrate:</b> |  |    |   |
|--|--|----|---|
| <b>3</b>   | <p>Only when the signatory relies on the terms of the agreement in asserting its claims against the nonsignatory or when the signatory's claims against the nonsignatory are intertwined with the agreement.</p> | AZ | <p><i>Schoneberger v. Oelze</i>, 96 P.2d 1078, 1081 n.5 (Az. Ct. App. 2004) (favorably citing <i>International Paper Co. v. Schwabedissen Maschinen &amp; Anlagen GMBH</i>, 206 F.3d 411 (4th Cir. 2000), where the Fourth Circuit stated that, where claims against a nonsignatory are intimately founded in and intertwined with a contract containing an arbitration clause, the signatory is estopped from refusing to arbitrate those claims).</p> |
|  |  | WA | <p><i>Rajagopalan v. Noteworld, LLC</i>, 718 F.3d 844, 847-48 (9th Cir. 2013) (where plaintiffs sued under both federal and Washington state law, applying the "intertwined claims" test in deciding whether the nonsignatory could compel the signatory to arbitrate).</p>   |
| <b>4</b>   | <p>Only when the signatory to the agreement raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the other signatories to the agreement.</p>  | MS | <p><i>Qualcomm Inc. v. Am. Wireless License Grp., LLC</i>, 980 So. 2d 261, 269 (Miss. 2007) (citing <i>B.C. Rogers</i> for the proposition that "a non-signatory may be able to enforce an arbitration agreement against a signatory where the non-signatory has a close legal relationship with a signatory of the agreement").</p>  |

| A nonsignatory to an agreement containing an arbitration clause can compel a signatory to the agreement to arbitrate: |   |                 |   |
|---|---|-----------------|---|
| 5   | In either situation (3) or (4) above.<br><br>(This test has often been referred to as the <i>MS Dealer</i> test or the <i>Grigson</i> test. See <i>MS Dealer Serv. Corp. v. Franklin</i> , 177 F.3d 942 (11th Cir. 1999); <i>Grigson v. Creative Artists Agency L.L.C.</i> , 210 F.3d 524 (5th Cir. 2000).) | CA              | <i>Kramer v. Toyota Motor Corp.</i> , 705 F.3d 1122, 1128-29 (9th Cir. 2013) (quoting <i>Goldman v. KPMG LLP</i> , 173 Cal. App. 4th 209, 219, 221 (2009)).               |
|   |   | CT <sup>6</sup> | <i>Res. Servs., LLC v. Bridgeport Hous. Auth.</i> , No. HHDCV106020108S, 2011 Conn. Super. LEXIS 1487, at *21 (Conn. Super. Ct. June 13, 2011)                            |
|   |   | FL              | <i>Marshall-Amaya &amp; Anton v. Arnold-Dobal</i> , 76 So. 3d 998, 1004 (Fla. Ct. App. 2011).   |
|   |   | IA              | <i>Wells Enterprises, Inc. v. Olympic Ice Cream</i> , 903 F. Supp. 2d 740, 798 (N.D. Ohio 2012) (predicting how the Iowa Supreme Court would rule).                       |
|   |   | KY              | <i>Household Fin. Corp. II v. King</i> , No. 2009-CA-001472-MR, 2010 Ky. App. Unpub. LEXIS 780, at *10-11 (Ky. Ct. App. Oct. 8, 2010).                                    |
|   |   | MD              | <i>Griggs v. Evans</i> , 43 A.3d 1081, 1093 (Md. Ct. Spc. App. 2012); see also <i>Westbard Apts., LLC v. Westwood Joint Venture, LLC</i> , 181 Md. App. 37, 51-52 (2007). |
|   |   | MI              | <i>City of Detroit Police &amp; Fire Retirement System v. Gsc Cdo Fund</i> , No. 289185, 2010 Mich. App. LEXIS 843, at *15 (Mich. Ct. App. May 11, 2010).                 |
| 6   | Only if both (3) and (4) are applicable.<br><br>(This is the federal test applied by the Ninth Circuit before the Supreme Court decided <i>Carlisle</i> in May 2009. See, e.g., <i>Mundi v. Union Sec. Life Ins. Co.</i> , 555 F.3d 1042 (9th Cir. 2009).)  | WI              | <i>Tickanen v. Harris &amp; Harris, Ltd.</i> , 461 F. Supp. 2d 863, 869 (E.D. Wisc. 2006) ( <i>pre-Carlisle</i> decision).  |
|   |   | CT              | <i>Kuryla v. Coady</i> , No. AANCV126009961, 2013 Conn. Super. LEXIS 647, at *30 (Conn. Super. Ct. Mar. 22, 2013).  |
|   |   | TX              | <i>In re Merrill Lynch Trust Co. FSB</i> , 235 S.W.3d 185, 191, 193-94 (Tex. 2007) (not foreclosing this test).   |

[Editor's Note: The preceding image contains the reference for footnote<sup>6</sup>]

Defendants' motion to compel arbitration clearly no merit. Under a traditional approach,

**C. Unlawful Interception and Transmittal**

The Court addresses first whether Defendants, as nonsignatories to the wireless carrier customer agreements, can compel Plaintiffs to arbitration pursuant to those agreements with respect to their claims for unlawful interception and transmittal. Defendants argue they can, under each of the equitable estoppel tests identified above. The Court does not agree.

“[a] claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person. The party asserting a claim of estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the facts, and such reliance must have been reasonable.”

**1. Traditional Equitable Estoppel**

Where a traditional equitable estoppel test is applicable,

*Peach v. CIM Ins. Corp.*, 816 N.E.2d 668, 674

(Ill.App.Ct.2004); *see also* B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So.2d 483, 492 (Miss.2005) (stating that “equitable estoppel exists where there is a(1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position”).

Here, when Plaintiffs entered into the wireless carrier customer agreements which contained the arbitration clauses,<sup>7</sup> they did not make any statements or take any actions *vis-a-vis* Defendants specifically which Defendants could then have reasonably relied on to their detriment—*i.e.*, that Plaintiffs would arbitrate any claim they had against Defendants. *See* Peach, 816 N.E.2d at 674. Indeed, Plaintiffs did not even know about the existence of CIQ and its software, so, at the very least, they could not have made any representations to CIQ itself.

Furthermore, each of the arbitration agreements refers to a customer making an agreement with the *wireless carrier* (*i.e.*, AT&T, Sprint, or Cricket) and *not* any other person or entity. *See, e.g.*, Dobbs Decl., Ex. 2 (AT&T Agreement at 1) (providing that “‘AT & T’ or ‘we,’ ‘us’ or ‘our’ refers to AT & T Mobility LLC”); Miller, Ex. B (Sprint 2011 Ts & Cs at 3) (providing that “‘we,’ ‘us,’ ‘our,’ ‘Nextel,’ and ‘Sprint’ mean Sprint Solutions, Inc.”); Baughman Decl., Ex. 1 (Cricket Ts & Cs § 1(a)) (indicating that the terms “‘us,’ ‘we,’ ‘our’ or ‘Cricket’ ” all refer to Cricket Communications, Inc.).

\*7 The Court notes that although Defendants appeared briefly to address traditional equitable estoppel in their reply papers, *see* Reply at 8 (arguing that Defendants detrimentally relied on the arbitration clauses because they did not require end users to assent to a separate arbitration agreement), Defendants conceded at the hearing they were not asserting traditional equitable estoppel herein.

## 2. “Rely” or “Intertwined” Test

The “rely”/“intertwined” test has been framed slightly differently depending on the state. For example, in California, a nonsignatory can compel a signatory to arbitration “‘when [the] signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract.’ ” *Murphy*, 724 F.3d at 1229. In Florida, a nonsignatory can compel a signatory to arbitration “‘when the signatory ...‘must rely on the terms of the written agreement in asserting [its] claims’ against the nonsignatory. When each of a signatory’s claims against a nonsignatory ‘makes

reference to’ or ‘presumes the existence of’ the written agreement, the signatory’s claims ‘arise[ ] out of and relate[ ] directly to the [written] agreement,’ and arbitration is appropriate.” *Marshall–Amaya & Anton v. Arnold–Dobal*, 76 So.3d 998, 1004 (Fla.Ct.App.2011). But regardless of the slight differences in framing, the fundamental policy underlying equitable estoppel is not in dispute—specifically, “a plaintiff may not, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a non-signatory.” *Murphy*, 724 F.3d at 1229 (internal quotation marks omitted).

The doctrine of equitable estoppel is thus predicated on the unfairness of allowing a party to rely on part of a contract in asserting a claim while, at the same time, disavowing another part of the same contract. Yet, Defendants do not contend that, in asserting their claims herein, Plaintiffs must rely—as a legal matter—on the terms of the wireless carrier customer agreements. The legal claims against Defendants are not in any legal way founded upon and do not arise out of the contracts with the wireless carriers. Instead, they are based on statutory rights not dependent upon the terms of those contracts. Equitable estoppel does not apply in such circumstances. *See* *Murphy*, 724 F.3d at 1231 n.7 (indicating that “equitable estoppel is particularly inappropriate where plaintiffs seek the protection of consumer protection laws against misconduct that is unrelated to any contract except to the extent that a customer service agreement is an artifact of the consumer-provider relationship itself”).

Defendants contend, nevertheless, that the unlawful interception/transmission claims rely on or are “intertwined” with the agreements because, to prevail on the claims, Plaintiffs must show that they did not consent to the interception/transmittal, whereas the wireless carrier customer agreements contain provisions which, at the very least, arguably indicate their consent. For example, Sprint’s Ts & Cs provide:

Information that we automatically collect. We automatically receive certain types of information whenever you use our Services. *We may collect information about your device, your computer, and online activities.* For example, we collect your device’s and computer’s IP address, the date and time of your access and the type of browser you use. We also collect information about your device’s and computer’s operating system, your location, and the Web site from which you came and then went, and Web sites you visit on your device. We may link information we automatically collect with personal information, such

as information you give us at registration or check out.

\*8 Information we collect when we provide you with Services includes when your wireless device is turned on, how your device is functioning, device signal strength, where it is located, what device you are using, what you have purchased with your device, how you are using it, and what sites you visit.

We may use systems or tools to follow your use of our Services, including using cookies, web beacons and other tracking mechanisms. For example, we allow collection by analytic service provider(s) of site click-stream and cookie data to help us track aggregate and individual use of our Services. We sometimes use cookies to enable features on our sites, like the ability to save your shopping cart or set preferences....

....

We may use your personal information for a variety of purposes, including providing you with Services. We use your personal information to do things like:

....

1. Monitor, evaluate or improve our Services, systems, or networks.

Miller Decl., Ex. GGG (Sprint Privacy Policy at 1–2).

As noted above, even if Plaintiffs have the burden of proving lack of consent or authority as part of their statutory claims, they are not invoking the wireless carrier customer agreements to establish their case; rather, it is Defendants who are invoking the agreements to disprove Plaintiffs' factual assertions. See *Ehlen Floor Covering, Inc. v. Lamb*, No. 2:07-cv-666-FtM-29DNF, 2010 U.S. Dist. LEXIS 84120, at \*8 (M.D.Fla. July 14, 2010) (stating that “[a]n issue raised as a defense ... is not attributable to the non-party in determining whether the non-party may be compelled to arbitrate”); see also *Granite Rock Co. v. International Brotherhood of Teamsters*, 130 S.Ct. 2847, 2863 (2010) (stating that “[t]he mere fact that Local [the union] raised the formation date dispute as a defense to Granite Rock’s suit does not make that dispute attributable to Granite Rock in the waiver or estoppel sense the Court of Appeals suggested, much less establish that Granite Rock agreed to arbitrate it by suing to enforce the CBA as to other matters”). Defendants have cited no case where defendant’s reliance on a contract justifies the application of equitable estoppel against the plaintiff who does not rely on the contract. A contrary holding would be divorced from the basic principle underlying the equitable

doctrine. See *Murphy*, 724 F.3d at 1229 (noting that equitable estoppel “reflects the policy that a plaintiff may not, ‘on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration’s applicability because the defendant is a non-signatory’ ”).

Furthermore, as made clear at the hearing, Plaintiffs are not suing Defendants for any conduct on the part of Defendants related to interception for/transmittal to the wireless carriers. That being the case, the fact that the wireless carrier customer agreements contain provisions which allow the wireless carriers (or even others acting on their behalf) to collect certain information from their customers is irrelevant. Plaintiffs are charging misconduct by Defendants because the CIQ software was intercepting for and transmitting to persons or entities other than the wireless carriers.

To the extent Defendants contend the “rely” or “intertwined” test can be met where an agreement is simply referred in the complaint or the existence of the agreement is presumed, the Court does not agree. While some cases use language of “refer to” or “presume the existence of,” that language must be taken in context. Defendants have not pointed to any case where the mere reference to an agreement (containing an arbitration clause) is adequate to demonstrate reliance. See, e.g., *Amisil Holdings Ltd. v. Clarium Cap. Mgmt., LLC*, 622 F.Supp.2d 825, 841 (N.D. Cal. 2007) (a pre-*Carlisle* case, stating that “each of the claims are related to the Agreement in a way that either refers to or presumes the existence of the Agreement” because “[a]bsent the Operating Agreement, none of these claims would lie ”; adding that “Amisil cannot use the Agreement as a sword and at the same time choose to ignore it as a shield”) (emphasis added).

\*9 Indeed, in *Murphy*, the Ninth Circuit (applying California law) expressly rejected an argument similar to that made by Defendants here. In *Murphy*, the plaintiffs sued Best Buy for making misrepresentations to customers at the point of sale that they were actually buying, rather than just leasing, certain DirecTV service equipment (e.g., receivers and digital video recorders). Best Buy did not have any agreement with the plaintiffs containing an arbitration clause, but there was an arbitration clause in the customer agreements that plaintiffs had with DirecTV. Best Buy, as a nonsignatory to the customer agreements, tried to compel the plaintiff-signatories to arbitration on the basis of equitable estoppel. The Ninth Circuit rejected Best Buy’s contention that the plaintiffs’ fraud claims relied on or

were intertwined with the DirecTV customer agreements.

Even if Best Buy is correct that Plaintiffs' [fraud] claims on some abstract level require the existence of the Customer Agreement, the law is clear that this is not enough for equitable estoppel. In California, equitable estoppel is inapplicable where a plaintiff's "allegations reveal no claim of any violation of any duty, obligation, term or condition imposed by the [customer] agreements." Applying this principle in *Kramer*, we held that Toyota could not compel arbitration of a consumer class action on the basis of arbitration clauses contained in the Purchase Agreements customers entered into with their dealerships. We expressly rejected Toyota's argument that the plaintiffs' claims were necessarily intertwined with the Purchase Agreements merely because the lawsuit was predicated on the bare fact that a vehicle purchase occurred. Rather, we held that the plaintiffs' causes of action, which, as here, largely arose under California consumer protection law, were not sufficiently intertwined with the Purchase Agreements to trigger equitable estoppel. Likewise, here, the Customer Agreement proves at most the existence of a transaction; Plaintiffs' claims do not depend on the Agreement's terms.

*Murphy*, 724 F.3d at 1230–31. See also *Kramer*, 705 F.3d at 1129 (stating that "[e]quitable estoppel applies only if the plaintiffs' claims against the nonsignatory are dependent upon, or inextricably bound up with, the obligations imposed by the contract plaintiff has signed with the signatory defendant" and that "[m]erely 'mak[ing] reference to' an agreement with an arbitration clause is not enough"); *Apple iPhone 3G*, 859 F.Supp.2d at 1095 (indicating that a "but-for" connection between the agreement and the challenged conduct is not enough). Moreover, in *Murphy*, the Ninth Circuit indicated that "equitable estoppel is particularly inappropriate where plaintiffs seek the protection of consumer protection laws against misconduct that is unrelated to any contract except to the extent that a customer service agreement is an artifact of the consumer-provider relationship itself." *Murphy*, 724 F.3d at 1231 n.7. See also *Rajagopalan*, 718 F.3d at 847 (noting that plaintiff "does not contend that [defendant] or any other party breached the terms of the contract; [i]nstead, [plaintiff] has 'statutory claims that are separate from the [ ] contract itself' "); *Kramer*, 705 F.3d at 1130–32 (rejecting claim that plaintiffs relied on dealer purchase agreement in asserting claim against Toyota). Hence, the fact that the installation of the CIQ software might not have occurred absent a service agreement between the wireless carriers and Plaintiffs does not satisfy the test of reliance or intertwining anymore than did the DirecTV contract in *Murphy* or the

dealer purchase agreement in *Kramer*. The wireless carrier customer agreement is merely "an artifact of the consumer-provider relationship itself." *Murphy*, 724 F.3d at 1231 n.7.

Finally, the Court notes that in applying the "intertwining" test, some courts have expressly required the claim be " 'intimately founded in and intertwined with' the underlying agreement" before equitable estoppel can apply. *Kramer*, 705 F.3d at 1128 (emphasis added). Notably, the two main cases on which Defendants rely meet this criteria. In *In re Apple & AT & TM Antitrust Litig.*, 826 F.Supp.2d 1168 (N.D.Cal.2011), plaintiffs alleged that ATTM and Apple agreed, without plaintiffs' knowledge or consent, to make ATTM the exclusive provider of voice and data services for the iPhone for five years (instead of just two). When the nonsignatory Apple invoked equitable estoppel to get the benefit of an arbitration agreement in an ATTM contract, the court noted that, "as to the intertwining of the claims, Plaintiffs themselves have contended throughout this litigation that their antitrust and related claims against ... ATTM and ... Apple arise from their respective ATTM contracts." *Id.* at 1178 (emphasis added). In *Apple iPhone 3G*, plaintiffs' "core allegation [was] that the ATTM 3G network could not accommodate iPhone 3G users, and that Plaintiffs were deceived into paying higher rates for service which could not be delivered on the 3G network." *Apple iPhone 3G*, 859 F.Supp.2d at 1096. When the nonsignatory Apple invoked equitable estoppel to get the benefit of an arbitration agreement in an ATTM contract, the court noted that plaintiffs' false advertising claims against Apple "arise from their service agreements with ATTM." *Id.* (emphasis added).

\*10 As noted above, the unlawful interception/transmittal claims herein against the non-carrier defendants herein did not arise from the wireless carrier customer agreements. Rather, they arise from alleged statutory violations (not breaches of contract) by CIQ and Defendants for conduct separate and distinct from the interception and transmission of information to wireless carriers. Defendants have failed to establish the "rely" and "intertwined" test applies under any of the applicable state laws.

### 3. "Interdependent Misconduct" Test

Similar to above, the "interdependent misconduct" test, is framed variously from state to state. For example, a Connecticut state court has held that "equitable estoppel allows a nonsignatory to compel arbitration ... when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and

concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.” *Res. Servs., LLC v. Bridgeport Hous. Auth.*, No. HHDCV106020108S, 2011 Conn.Super. LEXIS 1487, at \*21 (Conn.Super. Ct. June 13, 2011) (internal quotation marks omitted). In California, a nonsignatory can compel a signatory to arbitrate “ ‘when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the ‘allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement.’ ” *Kramer*, 705 F.3d at 1129.

For the unlawful interception/transmittal claims, Defendants argue that equitable estoppel is applicable under the “interdependent misconduct” test because Plaintiffs (signatories to the wireless carrier customer agreements) have raised allegations of substantially interdependent and concerted misconduct by Defendants (nonsignatories) and the wireless carriers (signatories). According to Defendants, “allegations that [CIQ and the Device] Defendants acted in concert with Plaintiffs’ Service Providers remain at the heart of Plaintiffs’ claims.” Mot. at 32. The Service Providers required the Device Defendants to install the CIQ software on the mobile devices, specified the types of data to be collected, and were the recipients of data transmitted off the mobile devices. *See* Mot. at 32.

Defendants acknowledge that, in the CAC, Plaintiffs have not sued the wireless carriers but argue that Plaintiffs should not be able to avoid arbitration simply by taking the tactical strategy of not naming the wireless carriers with whom they would clearly be required to arbitrate. *See* Mot. at 36–37. *See, e.g., Morselife Found., Inc. v. Merrill Lynch Bank & Trust Co., FSB*, No. 09–81143–CIV, 2010 U.S. Dist. LEXIS 83096, at \*8, 10–11 (S.D.Fla. July 21, 2010) (agreeing that, by dropping Merrill Lynch as the party defendant and filing an amended complaint solely against Merrill Lynch Bank & Trust Co., “Plaintiff is engaging in a tactical ploy to avoid MorseLife’s binding agreement to arbitrate ‘all controversies’ with Merrill Lynch”; adding that allegedly tortious acts of Merrill Lynch Bank & Trust Co. were inextricably interwoven with the conduct of employees of Merrill Lynch); *see also Wells Enters., Inc. v. Olympic Ice Cream*, 903 F.Supp.2d 740, 798 (N.D. Ohio 2012) (predicting that the Iowa Supreme Court would recognize equitable estoppel “when the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided”). Defendants also point out that, in at least some of the

member cases, the plaintiffs did originally sue wireless carriers.<sup>8</sup> *See, e.g., Silvera v. Carrier IQ, Inc.*, No. C–11–5821 EMC (Docket No. 1) (AT & T, Inc. and Sprint Communications Co., L.P.); *Medine v. Carrier IQ, Inc.*, No. C–11–6178 EMC (Docket No. 1) (AT & T Inc.); *Pacilli v. Carrier IQ, Inc.*, No. C–12–2137 EMC (Docket No. 1) (AT & T Inc., Sprint Nextel Corp., T-Mobile USA, Inc.); *Howell v. Carrier IQ, Inc.*, No. C–12–2314 EMC (Docket No. 1) (AT & T, Inc.); *Kacmarcik v. Carrier IQ, Inc.*, No. C–12–2315 EMC (Docket No. 1) (Sprint Nextel Corp.); *Eakins v. Carrier IQ, Inc.*, No. C–12–2537 EMC (Docket No. 1) (Sprint Communications Co., L.P.); *Siegel v. Carrier IQ, Inc.*, No. C–12–2543 EMC (Docket No. 1) (Sprint-Nextel Corp.); *Cassine v. Carrier IQ, Inc.*, No. C–12–1890 EMC (Docket No. 1) (Sprint Nextel Corp. and AT & T, Inc.).

\*11 The problem here is that Plaintiffs’ unlawful interception/transmission claims asserted herein are not predicated on allegations that Defendants colluded or otherwise acted in concert with the wireless carriers. Plaintiffs’ claims are based on interception for and transmittal to persons or entities *other* than the wireless carriers, whether it is CIQ itself, the OEM Defendants, Google, or application vendors or developers. At the hearing, Plaintiffs emphasized that private information was being collected *beyond* the scope of what the wireless carriers wanted—such information was not needed in order for the wireless carriers to maintain service to their customers and diagnose problems in providing service. Thus, even under a broad understanding of the “interdependent misconduct” test,<sup>9</sup> that test is not satisfied as a factual matter here.

Moreover, at least some state courts that have adopted the “interdependent misconduct” test have clarified that the interdependent misconduct between the parties alone is not enough; that conduct must be “ ‘founded in or intimately connected with the obligations of the underlying agreement.’ ” *Murphy*, 724 F.3d at 1229 (discussing California law). In other words, “ ‘[m]ere allegations of collusive behavior between signatories and nonsignatories to a contract are not enough to compel arbitration between parties who have not agreed to arbitrate.’ ” *Id.* at 1231 (quoting *Goldman v. KPMG LLP*, 173 Cal.App. 4th 209, 92 Cal.Rptr.3d 534, 545 (2009)). It is not so much the collusive behavior between the parties as it is “the relationship of the *claims*” that is key. *Id.* at 1231 (emphasis in original). “Even where a plaintiff alleges collusion, ‘[t]he *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the

agreement containing the arbitration clause.’ ” *Id.* at 1232. This application of the “interdependent misconduct” test is faithful to the underlying rationale of the equitable estoppel doctrine discussed above. For the reasons discussed above in conjunction with the “rely”/“intertwined” test, there is no interdependence between Plaintiffs’ statutory claims and the terms of the carriers’ agreements.

Thus, Defendants have failed to establish the applicability of the interdependent misconduct.

#### 4. Remaining Tests for Equitable Estoppel

Because Defendants cannot meet either the “intertwined” or “interdependent misconduct” test, the Court finds that Defendants are also incapable of meeting the various other tests under applicable state laws. As noted above, the remaining tests either require that the nonsignatory moving to compel arbitration meet *both* the “rely”/“intertwined” and “interdependent misconduct” tests or at least one of those tests. *A fortiori*, since neither element is satisfied in this case, equitable estoppel cannot be established under those state laws.

#### D. Implied Warranty

Plaintiffs’ implied warranty claims are asserted against the Device Defendants only and consist of two different theories:

\*12 (1) The mobile devices are designed and marketed for communication purposes, including for the transmittal and receipt of private information, but Plaintiffs’ devices are not performing as impliedly represented because they are intercepting and transmitting private information unbeknownst to them. *See, e.g.,* CAC ¶¶ 152, 167.

(2) The mobile devices cannot fulfill their ordinary purposes because the CIQ software installed on them depletes the devices of their battery power and life. *See, e.g.,* CAC ¶¶ 155, 169.

In their papers, the Device Defendants base their invocation of arbitration solely on the “rely” or “intertwined” test. *See* Mot. at 30; Reply at 4. Accordingly, for those states that do not allow for equitable estoppel based on the “rely” or “intertwined” test alone, there is no basis for compelling arbitration of those claims.

based on the “rely” or “intertwined” test alone, Defendants may not compel arbitration here. According to the Device Defendants, the implied warranty claims against them are intertwined with the wireless carrier customer agreements (containing the arbitration clause) because an implied warranty of merchantability arises from a contract for sale, *see, e.g.,* Cal. Comm.Code § 2314(1) (providing that “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind”), and here the only contracts for sale of the mobile devices are the wireless carrier customer agreements. *See* Mot. at 30 (asserting that “Plaintiffs purchased their mobile devices *from the wireless Service Providers* and the contracts that govern Plaintiffs’ purchase of the mobile device are the wireless service agreements”). The Device Defendants also argue that Plaintiffs must rely on the wireless carrier customer agreements in order to prove, *e.g.,* that they bought the devices in the first place (which gives Plaintiffs standing) and that their damages are the sales prices for the devices.

But the Device Defendants fail to take into account the allegations in the CAC. Plaintiffs’ implied warranty claims are not based on the wireless carrier customer agreements (indeed, Plaintiffs note in their opposition that the wireless carriers disclaimed any warranties in the agreements) but rather on written warranties provided by the Device Defendants themselves “in conjunction with the purchase [of] their mobile devices.” CAC ¶ 165. The Device Defendants do not challenge that they extended warranties themselves independent of the wireless carriers.<sup>10</sup>

\*13 While the Device Defendants suggest that Plaintiffs still have to rely on the wireless carrier customer agreements to establish, *e.g.,* the fact that they purchased the mobile devices, *Murphy* establishes that the mere fact that a contract proves the existence of a transaction is not enough to establish equitable estoppel; there must be dependence on the contract’s terms which is lacking here. *See* *Murphy*, 724 F.3d at 1231; *Kramer*, 705 F.3d at 1131–32 (stating that, “[i]n order for Toyota’s equitable estoppel argument to succeed, Plaintiffs’ claims themselves must intimately rely on the existence of the Purchase Agreements, not merely reference them”); *see also* *Apple iPhone 3G*, 859 F.Supp.2d at 1095 (stating that “but-for” connection was not sufficient to compel plaintiffs to arbitrate).

Accordingly, the Court concludes that there is no basis for equitable estoppel to apply to Plaintiffs’ claims for breach of the implied warranty of merchantability.

Even as to those states that allow for equitable estoppel

compel arbitration is therefore denied.

This order disposes of Docket No. 129.

IT IS SO ORDERED.

### III. CONCLUSION

For the foregoing reasons, the Court rejects Defendants' contention that they are entitled to invoke the arbitration provisions in the wireless customer agreements. Equitable estoppel being inapplicable, Defendants' motion to

#### Footnotes

<sup>1</sup> In the opening motion, Defendants state: "At this time, Motorola is not moving to compel arbitration with respect to Plaintiff Jennifer Patrick subject to further investigation.... Motorola does, however, intend to rely upon the ATTM arbitration clauses with respect to unnamed putative class members. Motorola and Carrier IQ reserve the right to compel Plaintiff Patrick to arbitration at a later time." Mot. at 3–4 n.4.

<sup>2</sup> For all state-based claims, Plaintiffs have implicated multiple states—and not simply the states where Plaintiffs were residing during the relevant period.

<sup>3</sup> *Cf. Xinhua Holdings Ltd. v. Electronic Recyclers Int'l, Inc.*, No. 1:13–CV–1409 AWI SKO, 2013 WL 6844270, at \*5 (E.D.Cal. Dec. 26, 2013) (stating that, for purposes of deciding a motion to compel arbitration, a court may consider documents outside the pleadings)

<sup>4</sup> Plaintiffs contend Defendants waived any argument that state, as opposed to federal, law on equitable estoppel applies. However, any such waiver by Defendants of state law makes no material difference because federal is substantially similar to state law. *See Kramer*, 705 F.3d at 1130 n.5 (nothing that, although Ninth Circuit in *Mundi* cited federal equitable estoppel cases, the court applied the same substantive law on equitable estoppel that a California court would have applied).

<sup>5</sup> Plaintiffs contend that Arizona and Wisconsin belong in this category. While Plaintiffs' position is not without any merit, the Court has—out of an abundance of caution—placed these states in other categories that are more favorable to Defendants. Even with this "benefit," the Court concludes that Defendants still cannot establish equitable estoppel as appropriate in the case at bar.

<sup>6</sup> Connecticut has cases both in category (5) and category (6).

<sup>7</sup> As noted above, the Court assumes for purposes of this order that there are no problems with formation and conscionability.

<sup>8</sup> However, none of the *named* Plaintiffs appear to have sued any wireless carrier. And at least the current CAC does not name any wireless carrier as a defendant.

<sup>9</sup> At the hearing, Defendants suggested Iowa is one such state. In *Wells Enterprises, Inc. v. Olympic Ice Cream*, 903 F.Supp.2d 740 (N.D. Ohio 2012), a federal court in Iowa predicted that the Iowa Supreme Court would recognize "two situations in which alternative estoppel may arise," one of which was "when the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Id.* at 798 (internal quotation marks omitted). Defendants have not demonstrated this test is materially different from that applied in other states.

<sup>10</sup> The Court also notes that Plaintiffs would not have to rely on the wireless carrier customer agreements to provide the contractual basis for their claim because they may rely on a contract for sale *other* than the wireless carrier customer agreements—for example, a contract for sale between the Device Defendants and another person or entity in the distribution chain before the mobile devices get to the end consumer (with the end consumer being the intended third-party beneficiary). *Cf. Sheeskin v. Giant Food, Inc.*, 318 A.2d 874, 886 (Md.Ct.Spc.App.1974) (stating that, "[w]hile privity between the bottler and the ultimate consumer is not required, a 'sale' or 'contract for sale' is required in order to make the warranty implied by § 2–314 applicable [;][t]hus, there must be a sale or contract for sale from the bottler to some individual in the distributive chain in order for the implied warranties to arise in favor of the ultimate consumer"). While Plaintiffs have not expressly alleged that they are third-party beneficiaries of such a contract for sale, such a theory may fairly be implied; moreover, express allegations to that effect could easily be added to the operative complaint. In any event, regardless of whether Plaintiffs ultimately state such a claim on the merits, a matter that may be tested at another juncture, their implied warranty claim does not rely on the carrier agreements and thus arbitration may not be compelled.

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2014 WL 4230056

Only the Westlaw citation is currently available.  
United States District Court,  
M.D. Alabama,  
Eastern Division.

Nettie CHAMBERS, et al., Plaintiffs,  
v.  
GROOME TRANSPORTATION OF ALABAMA, et  
al., Defendants.

Case No. 3:14-CV-237-WKW. | Signed Aug. 26,  
2014.

#### Synopsis

**Background:** Shuttle bus drivers brought collective action against their former employer and corporate officers, alleging overtime wage claims under Fair Labor Standards Act (FLSA) and violations of Worker Adjustment and Retraining Notification (WARN) Act. Defendants moved to compel arbitration.

**Holdings:** The District Court, W. Keith Watkins, Chief Judge, held that:

[1] employer demonstrated that it had valid written agreement with one driver for arbitration of her claims;

[2] employer did not demonstrate that it had valid written agreement with remaining drivers for arbitration of their claims;

[3] arbitration agreement involved interstate commerce;

[4] employer did not demonstrate that employees' continued employment indicated mutual assent to terms of arbitration agreement;

[5] employees' FLSA and WARN act claims were within scope of arbitration agreement;

[6] forum-selection clause did not render arbitration agreement unconscionable; and

[7] any restriction in arbitration agreement on employees' right to pursue class action was not unconscionable.

Motion granted in part and denied in part.

#### West Headnotes (41)

[1] **Alternative Dispute Resolution**  
↔ Validity  
**Alternative Dispute Resolution**  
↔ Performance or Breach

When addressing a motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), a district court must determine whether there is a binding agreement to arbitrate and, if so, whether the nonmovant has breached its obligation to arbitrate under that agreement. 9 U.S.C.A. § 4.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**  
↔ Evidence

A district court can consider evidence outside of the pleadings for purposes of a motion to compel arbitration.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**  
↔ Arbitration Favored; Public Policy  
**Alternative Dispute Resolution**  
↔ Construction in Favor of Arbitration

The Federal Arbitration Act (FAA) evinces a liberal federal policy favoring arbitration agreements; any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

<sup>141</sup> **Alternative Dispute Resolution**  
⚡Right to Enforcement and Defenses in General  
  
Courts rigorously enforce arbitration agreements.

Cases that cite this headnote

<sup>151</sup> **Alternative Dispute Resolution**  
⚡Existence and Validity of Agreement  
**Alternative Dispute Resolution**  
⚡Arbitrability of Dispute  
  
On a motion to compel arbitration, issues of whether an arbitration agreement is a written agreement involving interstate commerce as required by the Federal Arbitration Act (FAA), whether the arbitration agreement is unenforceable for lack of mutual assent or because it is unconscionable, and whether the scope of the arbitration agreement covers federal statutory claims or claims predicated on conduct that preexists the making of the arbitration agreement are presumptively for the court to decide, unless there is an agreement to the contrary between the contracting parties. 9 U.S.C.A. § 2.

Cases that cite this headnote

<sup>161</sup> **Alternative Dispute Resolution**  
⚡Arbitrability of Dispute  
  
Parties may delegate the authority to rule on gateway arbitrability issues to an arbitrator without running afoul of the Federal Arbitration Act (FAA) or case law; and courts should enforce valid delegation provisions as long as there is clear and unmistakable evidence that the parties manifested their intent to arbitrate a gateway question. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

<sup>171</sup> **Alternative Dispute Resolution**  
⚡Operation and Effect  
  
Provision of arbitration agreement between employees and employer providing that arbitration “shall be administered and conducted under the Mediation Rules by mediators of the American Arbitration Association (“AAA”),” was not express delegation that clearly and unmistakably demonstrated that parties agreed that arbitrator would decide issues of arbitrability in the event of a lawsuit; agreement did not provide for application of AAA arbitration rules at all, but rather its mediation rules, with governance by a mediator, not an arbitrator.

Cases that cite this headnote

<sup>181</sup> **Alternative Dispute Resolution**  
⚡Constitutional and Statutory Provisions and Rules of Court  
**Alternative Dispute Resolution**  
⚡Writing, Signature, and Acknowledgment  
**Commerce**  
⚡Arbitration  
  
The provision of the Federal Arbitration Act (FAA) requiring enforcement of contracts containing arbitration provisions requires a two-pronged inquiry: first, whether there is an arbitration agreement in writing, and second, if so, whether the agreement is part of a transaction involving interstate commerce. 9 U.S.C.A. § 2.

Cases that cite this headnote

<sup>191</sup> **Alternative Dispute Resolution**  
⚡Arbitration Favored; Public Policy  
  
The federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties pursuant to the Federal Arbitration Act (FAA). 9

U.S.C.A. § 2.

Cases that cite this headnote

The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. 9 U.S.C.A. § 4.

Cases that cite this headnote

<sup>[10]</sup> **Alternative Dispute Resolution**  
☞ Remedies and Proceedings for Enforcement in General

On a motion to compel arbitration, only when there is no genuine issue of fact concerning the formation of the arbitration agreement should a court decide as a matter of law that the parties did or did not enter into such an agreement. 9 U.S.C.A. § 4.

Cases that cite this headnote

<sup>[14]</sup> **Alternative Dispute Resolution**  
☞ Disputes and Matters Arbitrable Under Agreement  
**Alternative Dispute Resolution**  
☞ Evidence

Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration; under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in general. 9 U.S.C.A. § 4.

Cases that cite this headnote

<sup>[11]</sup> **Alternative Dispute Resolution**  
☞ Evidence

As in the case of any other summary judgment, a district court considering the making of an agreement to arbitrate, should give to the party denying the agreement the benefit of all reasonable doubts and inferences that may arise.

Cases that cite this headnote

<sup>[15]</sup> **Alternative Dispute Resolution**  
☞ Writing, Signature, and Acknowledgment

Employer demonstrated that it had valid written agreement with employee for arbitration of her claims, where there was evidence that employee signed written arbitration agreement, and employee did not contest authenticity of her signature. 9 U.S.C.A. § 2.

Cases that cite this headnote

<sup>[12]</sup> **Alternative Dispute Resolution**  
☞ Contractual or Consensual Basis

Under the Federal Arbitration Act (FAA), parties cannot be forced to submit to arbitration if they have not agreed to do so. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

<sup>[16]</sup> **Alternative Dispute Resolution**  
☞ Writing, Signature, and Acknowledgment

Employer did not demonstrate that it had valid written agreement with employees for arbitration of their claims, even though

employees received copy of personnel policy handbook containing arbitration agreement, where agreement contained signature lines for employer and employee to acknowledge assent to arbitration, there was no evidence that employees signed agreement, and there was no evidence of written provision memorializing that employees were deemed to have accepted agreement by continuing their employment. 9 U.S.C.A. § 2.

Cases that cite this headnote

- [17] **Alternative Dispute Resolution**  
↔ Constitutional and Statutory Provisions and Rules of Court  
**Commerce**  
↔ Arbitration

Arbitration agreement between employer and employees involved interstate commerce, as required for agreement to be valid and enforceable under the Federal Arbitration Act (FAA); although employees' responsibilities might have been confined to intra-state shuttle bus services, employees did not counter employer's assertion that its general practice of employment involved commerce. 9 U.S.C.A. § 2.

Cases that cite this headnote

- [18] **Federal Courts**  
↔ Alternative Dispute Resolution

When deciding whether parties agreed to arbitrate, courts generally should apply state law principles governing formation of contracts.

Cases that cite this headnote

- [19] **Alternative Dispute Resolution**  
↔ Evidence

Under Alabama law, employer, as party advocating arbitration of disputes with employees, had burden of showing existence of a contract.

Cases that cite this headnote

- [20] **Contracts**  
↔ Elements in General

Under Alabama law, the basic elements of a contract are an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement.

Cases that cite this headnote

- [21] **Contracts**  
↔ Necessity of Assent  
**Contracts**  
↔ Signature

Under Alabama law, the purpose of a signature on a contract is to show mutual assent; however, the existence of a contract may also be inferred from other external and objective manifestations of mutual assent.

Cases that cite this headnote

- [22] **Contracts**  
↔ Necessity of Assent  
**Contracts**  
↔ Signature  
**Contracts**  
↔ Confirmation or Ratification of Defective Instrument

Under Alabama contract law, mutual assent must be manifested by something, and ordinarily, it is manifested by a signature; however, assent may be manifested by ratification.

Cases that cite this headnote

<sup>[23]</sup> **Alternative Dispute Resolution**  
☞ Writing, Signature, and Acknowledgment

Under Alabama law, an employee’s signature is not the only way for an employee to assent to the terms of an arbitration agreement.

Cases that cite this headnote

<sup>[24]</sup> **Alternative Dispute Resolution**  
☞ In General; Formation of Agreement

Under Alabama law, employer did not demonstrate that employees’ continued employment after receipt of arbitration agreement indicated each employee’s mutual assent to terms of arbitration agreement; employer did not submit sufficient evidence showing that it notified its employees in writing that acceptance of arbitration agreement was prerequisite for continued employment.

Cases that cite this headnote

<sup>[25]</sup> **Federal Courts**  
☞ Alternative Dispute Resolution

To determine which disputes between the parties to an enforceable arbitration agreement are covered by the language of the arbitration clause, a district court applies the federal substantive law of arbitrability, which is applicable to any arbitration agreement within the coverage of the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

☞ Employment Disputes

Employees’ claims against employer under the FLSA and Worker Adjustment and Retraining Notification (WARN) Act were within scope of arbitration agreement providing that it applied to any dispute, controversy or claim; agreement had no express exclusion that precluded employer or employees from arbitrating past claims that pre-dated implementation of agreement, employees did not submit any evidence refuting presumption of arbitrability, and broad language of agreement generally and fairly informed signatories that it covered statutory claims. 9 U.S.C.A. § 2; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Worker Adjustment and Retraining Notification Act, § 2 et seq., 29 U.S.C.A. § 2101 et seq.

Cases that cite this headnote

<sup>[27]</sup> **Alternative Dispute Resolution**  
☞ Disputes and Matters Arbitrable Under Agreement

An agreement to arbitrate any action, dispute, claim, counterclaim or controversy between the parties includes the arbitration of statutory claims because any disputes means all disputes, because any means all.

Cases that cite this headnote

<sup>[28]</sup> **Alternative Dispute Resolution**  
☞ Unconscionability

Arbitration agreements may be held unenforceable if, under the controlling state law of contracts, requiring arbitration of a dispute would be unconscionable.

Cases that cite this headnote

<sup>[26]</sup> **Alternative Dispute Resolution**

<sup>[29]</sup> **Alternative Dispute Resolution**

☞ Validity  
**Alternative Dispute Resolution**  
☞ Validity of Assent  
**Alternative Dispute Resolution**  
☞ Unconscionability

Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.

Cases that cite this headnote

unconscionable; where there is a valid arbitration agreement, however, the arbitrator, rather than the court, decides in the first instance whether the forum selection clause is unconscionable.

Cases that cite this headnote

[30] **Alternative Dispute Resolution**  
☞ Unconscionability  
**Alternative Dispute Resolution**  
☞ Evidence

Under Alabama law, arbitration provisions are not per se unconscionable; instead, unconscionability is an affirmative defense to the enforcement of a contract, and the party asserting that defense bears the burden of proving it by substantial evidence.

Cases that cite this headnote

[33] **Alternative Dispute Resolution**  
☞ Unconscionability

Under Alabama law, forum-selection clause requiring employees to arbitrate claims against employer in Virginia did not render arbitration agreement unconscionable; employees' sole argument was that class members should not have to litigate claims under Worker Adjustment and Retraining Notification (WARN) Act separate and apart from group that was laid off in mass, but they failed to explain how this effect rendered arbitration agreement so grossly favorable to employer as to demonstrate unconscionability. Worker Adjustment and Retraining Notification Act, § 2 et seq., 29 U.S.C.A. § 2101 et seq.

Cases that cite this headnote

[31] **Contracts**  
☞ Unconscionable Contracts

Under Alabama law, the applicable standards for determining unconscionability of a contract are whether there are (1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power.

Cases that cite this headnote

[34] **Alternative Dispute Resolution**  
☞ Unconscionability

Under Alabama law, mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.

Cases that cite this headnote

[32] **Alternative Dispute Resolution**  
☞ Unconscionability

Where a plaintiff claims an arbitration agreement itself is unconscionable due to a forum selection clause, the court considers whether the arbitration agreement is

[35] **Alternative Dispute Resolution**  
☞ Unconscionability

Under Alabama law, nonsensical language in arbitration agreement between employer and employees providing that arbitration would be administered under mediation rules by mediators

of American Arbitration Association did not render arbitration agreement unconscionable; although agreement included two references to mediation, it expressly committed parties to resolve disputes through binding arbitration, agreement expressly set out that it constituted waiver of right to jury trial in court action, and no employee presented facts that suggest parties intended not to arbitrate their disputes.

Cases that cite this headnote

<sup>[36]</sup> **Alternative Dispute Resolution**  
☞ Operation and Effect

The waiver of the right to a jury trial is consistent with an agreement to arbitrate, not an agreement to mediate.

Cases that cite this headnote

<sup>[37]</sup> **Alternative Dispute Resolution**  
☞ Unconscionability

Under Alabama law, the possibility of termination flowing from an employee's refusal to sign an acknowledgement form accepting arbitration as the means for resolving legal disputes is not, in and of itself, unconscionable.

Cases that cite this headnote

<sup>[38]</sup> **Alternative Dispute Resolution**  
☞ Validity

Under Alabama law, classwide arbitration is permitted only when the arbitration agreement provides for it.

Cases that cite this headnote

<sup>[39]</sup> **Alternative Dispute Resolution**  
☞ Unconscionability

Any restriction in arbitration agreement on employees' right to pursue a class action against their employer was not unconscionable under Alabama law; agreement contained no limitations on recovery of damages, employees made no contention that their potential recovery in arbitration would be necessarily smaller than amount they would be required to spend just to arbitrate case, and fact that it might have been more efficient to proceed as class was not to say that prohibition of class-action procedures was unconscionable.

Cases that cite this headnote

<sup>[40]</sup> **Federal Civil Procedure**  
☞ Class Actions

The right of a litigant to employ the Federal Rule of Civil Procedure governing class actions is a procedural right only, ancillary to the litigation of substantive claims, and the availability of the class action mechanism presupposes the existence of a claim. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

<sup>[41]</sup> **Alternative Dispute Resolution**  
☞ Constitutional and Statutory Provisions and Rules of Court

The Federal Arbitration Act's (FAA) command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. 9 U.S.C.A. § 2.

Cases that cite this headnote

### Attorneys and Law Firms

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## MEMORANDUM OPINION AND ORDER

W. KEITH WATKINS, Chief Judge.

### I. INTRODUCTION

\*1 Forty-five Plaintiffs bring this complaint against their former employer, alleging violations of the Workers' Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–09 ("WARN Act") and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–19. In lieu of an answer, Defendant Groome Transportation of Alabama, Inc. ("Groome Transportation") filed a motion to compel arbitration. (Doc. # 8.) Groome Transportation argues that an arbitration agreement and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16 require Plaintiffs to submit their claims to binding arbitration rather than file suit. Plaintiffs oppose the motion. After careful consideration of the arguments of counsel, the relevant law, and the evidence, the court finds that, as to all but one Plaintiff, there exists a genuine dispute with respect to the "making" of an arbitration agreement. As to those forty-four Plaintiffs, this action will proceed to a bench trial pursuant to 9 U.S.C. § 4 regarding the making of agreements to arbitrate. As to Plaintiff Annie L. Adams, Groome Transportation's motion to compel arbitration is due to be granted.

### II. JURISDICTION AND VENUE

Subject-matter jurisdiction is proper pursuant to 28 U.S.C. § 1331. Personal jurisdiction and venue are uncontested.

### III. BACKGROUND

The forty-five Plaintiffs are former employees of Groome Transportation, which had contracted with Auburn University to provide shuttle bus services for its students. Plaintiffs worked as shuttle bus drivers, transporting students within Auburn's city limits and principally on Auburn University's campus, beginning prior to April 2012 and continuing until July 2013 when Groome Transportation closed its area plant. (Compl. ¶ 16.)

Until April 2012, Groome Transportation paid Plaintiffs at a rate of time-and-a-half for all hours worked over forty per week. However, in April 2012, Groome Transportation ceased paying its shuttle bus drivers overtime wages, even though the drivers continued to perform the same duties and work the same shifts with overtime hours. Plaintiffs allege that, at this time, Groome Transportation created a bogus shuttle service to the Atlanta, Georgia airport in an attempt to "create a loophole in the [FLSA] overtime laws" presumably under the motor-carrier exemption, *see* 29 U.S.C. § 213(b)(1).<sup>1</sup> In October 2012, Groome Transportation drivers "staged a walk-out." (Pl. Cassandra Young Aff., at 2 (Doc. # 18–1).) As a result of the walk-out and concomitant pressure from Auburn University, Groome Transportation recommenced paying overtime wages in December 2012.

Additionally, in October 2012, around the time of the walk-out, Groome Transportation presented its employees with a one-page Arbitration Agreement, which was added to the Personnel Policy Handbook. The Arbitration Clause and Agreement provides:

The parties agree that any dispute, controversy or claim arising out of or related to Employee's employment with Groome Transportation of Alabama, shall be submitted to and decided by binding arbitration in Richmond, Virginia. Arbitration shall be administered and conducted under the Mediation Rules by mediators of the American Arbitration Association ("AAA"). The rules are available online at [www.adr.org](http://www.adr.org). You may also call the AAA at 1-800-778-7879 if there are any questions about the arbitration process. Discovery in any arbitration proceeding shall be conducted according to the American Arbitration Association Rules.

\*2 (Arbitration Agreement (Ex. A to Doc. # 8).) The Arbitration Agreement also contains an acknowledgement with signature lines for the employee and a Groome Transportation official to sign. The acknowledgment provides:

This agreement to arbitrate is freely negotiated between Employee and Groome Transportation of Alabama, and is mutually entered into between the parties. Each party fully understands and agrees that they are giving up certain rights otherwise afforded to them by civil court actions, including but not limited to a jury trial.

(Arbitration Agreement.)

The record does not reveal how many Plaintiffs signed the acknowledgement. Groome Transportation submits only one signed Arbitration Agreement, and that agreement bears the signature of Plaintiff Annie L. Adams, dated January 23, 2013. (Pl. Adams's Arbitration Agreement (Ex. A to Doc. # 8).) Plaintiffs, in turn, submit one affidavit from Plaintiff Cassandra Young, who says that she "refused to sign the arbitration agreement." (Young's Aff., at 2.) While Ms. Young further attests that "many [other] employees" also refused to sign, she does not identify which Plaintiffs, if any, are in the group of employees who did not sign an Arbitration Agreement. (Young's Aff., at 2.) On this record then, the facts known are that one Arbitration Agreement bears the signature of Annie L. Adams (who has not disputed the authenticity of the signature) and that one Plaintiff has refused to sign the agreement. The status of whether the remaining forty-three Plaintiffs signed or did not sign an Arbitration Agreement is unknown.

Groome Transportation's Regional Director, Kristie Holcombe, also attests that, "[a]s a condition of employment and/or continued employment, the Personnel Policy Handbook has contained a mutually binding arbitration agreement since October 19, 2012." (Holcombe's Aff., at ¶ 4 (Ex. 1 to Doc. # 8).) Groome Transportation has not submitted an excerpt from the Personnel Policy Handbook that contains a written provision indicating that continued employment equates acceptance of the Arbitration Agreement. (Holcombe's Aff., at ¶ 4.) It is unclear from Ms. Holcombe's affidavit how Groome Transportation notified its employees of this condition of employment. Ms. Young attests, though, that Groome Transportation officials orally informed her, that if she did not sign the Arbitration Agreement, her

employment would be terminated. But she also says that, when she refused to sign the agreement, she was not fired. Ms. Young also attests that she is "not aware of any co-workers who were terminated for refusing to sign the arbitration agreement." (Young's Aff., at 2.)

Ms. Young, along with her co-Plaintiffs, continued to work for Groome Transportation until July 2013, when Groome Transportation closed its Lee County facility. At that time, Plaintiffs' employment ended.

On April 2, 2014, Plaintiffs filed this action against Groome Transportation and three of its corporate officers. The Complaint contains two counts. In Count One, which alleges violations of the FLSA, Plaintiffs contend that from approximately April 1, 2012, to November 30, 2012, Groome Transportation did not adequately compensate them for hours worked in excess of forty hours per week. *See* 29 U.S.C. § 207(a)(1) (requiring that employees who work in excess of forty hours per week be compensated "at a rate not less than one and one-half times the regular rate at which he is employed"). Plaintiffs seek unpaid overtime wages in a collective action under the FLSA. In Count Two, Plaintiffs bring a claim under the WARN Act, individually and as representatives of a proposed class, alleging that Groome Transportation failed to give the minimum sixty-day written notice to its employees as required by the WARN Act. Plaintiffs seek all relief available under the WARN Act, including sixty days back pay. Plaintiffs further demand a jury trial as to Count One. But Groome Transportation contends that court litigation of Plaintiffs' claims is not an option and that Plaintiffs must submit their claims to arbitration.

#### IV. STANDARD OF REVIEW

\*3 <sup>11</sup> Pursuant to the FAA, a written arbitration provision in a "contract evidencing a transaction involving commerce" is "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. If a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement," it may petition a federal district court "for an order directing that such arbitration proceed in the manner provided for in [the] agreement." 9 U.S.C. § 4. When addressing a § 4 motion, the district court must determine whether there is a binding agreement to arbitrate and, if so, whether the nonmovant has breached its obligation to arbitrate under that agreement. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 n. 27, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (citing 9 U.S.C. §§ 4, 6).

<sup>12]</sup> The court can consider evidence outside of the pleadings for purposes of a motion to compel arbitration. The Eleventh Circuit has countenanced the use of the summary judgment standard to resolve a motion to compel arbitration. See *Johnson v. KeyBank Nat'l Assoc.*, 754 F.3d 1290, 1294 (11th Cir.2014) (describing an order compelling arbitration as “summary-judgment-like”; it is “ ‘in effect a summary disposition of the issue of whether or not there has been a meeting of the minds on the agreement to arbitrate’ ”) (quoting *Magnolia Capital Advisors, Inc. v. Bear Stearns & Co.*, 272 Fed.Appx. 782, 785–86 (11th Cir.2008) (per curiam)).

<sup>13]</sup> <sup>14]</sup> The FAA evinces a “liberal federal policy favoring arbitration agreements.” *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir.2005) (quoting *Moses*, 460 U.S. at 24, 103 S.Ct. 927); see also *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1253 (11th Cir.2009) (“The FAA creates a strong federal policy in favor of arbitration.”). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone*, 460 U.S. at 24–25, 103 S.Ct. 927. Accordingly, courts “rigorously enforce” arbitration agreements. *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir.2004). The FAA provides that “upon any issue referable to arbitration under an agreement in writing for such arbitration,” and “upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,” the court “shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. § 3.

## V. DISCUSSION

The motion to compel arbitration, as briefed by the parties, raises four issues: (1) whether the Arbitration Agreement is a written agreement involving interstate commerce as required by 9 U.S.C. § 2; (2) whether the Arbitration Agreement is unenforceable for lack of mutual assent or because it is unconscionable; (3) whether the scope of the Arbitration Agreement, assuming that it is binding, covers federal statutory claims or claims predicated on conduct that preexists the making of the Arbitration Agreement; and (4) whether the parties agreed that the arbitrator would decide the first four issues.

\*4 <sup>15]</sup> Issues one, two, and three are relevant to whether the “making of the agreement for arbitration” is “in issue” such that a trial is necessary under 9 U.S.C. § 4. These issues are presumptively for the court to decide, unless

there is an “agreement to the contrary between the contracting parties.” *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1352 (11th Cir.2011) (explaining that the Supreme Court has “noted two questions that are presumptively for the courts: ‘whether the parties are bound by a given arbitration clause’ and ‘whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.’”) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)). These issues will be referred to as issues of arbitrability. See *Howsam*, 537 U.S. at 83, 123 S.Ct. 588 (“The question whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” (quotation marks, alterations, and citation omitted)). The fourth issue focuses on which forum—judicial or arbitral—is the appropriate forum for resolution of issues one, two, and three. The fourth issue necessarily must be addressed first. Because the fourth issue resolves in favor of a judicial determination of the issues of arbitrability, this opinion also addresses issues one, two, and three.

### A. The Appropriate Forum—Judicial or Arbitral—for Deciding the Issue of Arbitrability

A threshold issue raised by Groome Transportation is whether the court or the arbitrator should resolve Plaintiffs’ arguments pertaining to the issues of arbitrability. Groome Transportation contends that the parties “have agreed to abide by the provisions of the AAA [American Arbitration Association]” and that, therefore, “the arbitrator has jurisdiction to decide whether the arbitration agreement applies.” (Doc. # 21, at 12.)

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), the Supreme Court addressed the standard for assessing “who—the court or the arbitrator—has the primary authority to decide whether a party has agreed to arbitrate.” *Id.* at 942, 115 S.Ct. 1920. The Court explained:

When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has

agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clear and unmistakable” evidence that they did so. In this manner the law treats silence or ambiguity about the question “who (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement”—for in respect to this latter question the law reverses the presumption.

\*5 But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law’s permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter. On the other hand, the former question—the “who (primarily) should decide arbitrability” question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the “who should decide arbitrability” point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

*Id.* at 944–45, 115 S.Ct. 1920.

<sup>161</sup> Parties may delegate, therefore, the authority to rule on gateway arbitrability issues to the arbitrator without running afoul of the FAA or case law. *See Johnson*, 754 F.3d at 1291 (“Arbitration-friendly federal law recognizes ‘delegation clauses’ that direct an arbitrator to decide the validity of an arbitration agreement.”). And “[c]ourts should enforce valid delegation provisions as long as there is ‘clear and unmistakable’ evidence that that the parties manifested their intent to arbitrate a gateway question.” *Given v. M & T Bank Corp.*, 674 F.3d 1252, 1255 (11th Cir.2012) (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n. 1, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010)). As the Eleventh Circuit has explained, “this rule makes imminent sense, for in the absence of ‘clear and unmistakable evidence’ that the parties intended the arbitrator to rule on the validity of the arbitration itself, the arbitrator would lack authority to invalidate the very contract from which he derives his

authority to begin with.” *Terminix Int’l Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1331 (11th Cir.2005).

Groome Transportation contends that *Terminix* controls and requires a finding that the arbitrability question itself is for the arbitrator. The court disagrees.

In *Terminix*, the Eleventh Circuit held that the parties had agreed to arbitrate whether disputes were arbitrable based upon the agreement’s incorporation of the AAA’s Commercial Arbitration Rules. Those rules gave the arbitrator the power “ ‘to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.’ ” *Id.* (quoting AAA Commercial Arbitration Rule 8(a)). The Eleventh Circuit held that, “[b]y incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.” *Id.*

\*6 The arbitration agreement in *Terminix* expressly incorporated the AAA’s Commercial Arbitration Rules, and those rules in turn delegated issues of arbitrability to the arbitrator. *Id.* “The Eleventh Circuit and the majority of other Circuits ... have held that ... incorporation of arbitration rules that empower an arbitrator to decide the issue of arbitrability is sufficient” for an effective delegation. *Supply Basket, Inc. v. Global Equip. Co.*, No. 13cv3220, 2014 WL 2515345, at \*2 (N.D.Ga. June 4, 2014) (citing *Terminix*, 432 F.3d at 1332–33 (collecting cases)). As the *Supply Basket* court recognized, “[T]oday, all of the AAA rules include a jurisdictional rule stating, ‘[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.’ ” 2014 WL 2515345, at \*3 (quoting the Labor Arbitration Rules (Including Expedited Labor Arbitration Rules), the Employment Arbitration Rules and Mediation Procedures, the Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)). The court concluded, therefore, that, “by agreeing to arbitration by the AAA—under any set of AAA rules in place at the time the Agreements were executed or today—the Plaintiffs agreed to arbitrate the issue of arbitrability.” *Id.*

<sup>171</sup> Unlike in *Terminix*, Groome Transportation’s Arbitration Agreement does not contain an express delegation that clearly and unmistakably demonstrates that the parties agreed that the arbitrator would decide issues of arbitrability. The Arbitration Agreement does not contain a provision that a particular subset of the AAA’s arbitration rules governs or even a generic reference to the AAA’s arbitration rules. Instead, in

unclear draftsmanship, the agreement provides that “[a]rbitration shall be administered and conducted under the Mediation Rules by mediators of the American Arbitration Association (“AAA”).” (Doc. # 8, Ex. A.) The principal point of ambiguity is that the Arbitration Agreement does not provide for the application of the AAA’s *arbitration* rules at all, but rather its *mediation* rules, with governance by a *mediator*, not an *arbitrator*. Groome Transportation has not cited any provision of the referenced “Mediation Rules” that delegates to the arbitrator the authority to decide his or her own jurisdiction and understandably so. The court has visited [www.adr.org](http://www.adr.org) (last visited on Aug. 26, 2014),<sup>3</sup> but was unable to find a set of rules titled “Mediation Rules.” Rather, the website reveals that there are various types of rules (e.g., Commercial Arbitration Rules, Labor Arbitration Rules, Employment Arbitration Rules, Construction Industry Arbitration Rules), and that “[m]ediation procedures are included in all of [the AAA’s] major arbitration procedures, either as an option or as a step prior to an arbitration hearing.” The Arbitration Agreement here is confusing because of its reference to “Mediation Rules” that do not independently exist on the AAA’s website and that, quite simply, are not arbitration rules.<sup>4</sup>

\*7 Groome Transportation has not attempted to dispel the ambiguity that the reference creates as to whether the parties intended to delegate to the arbitrator the issue of arbitrability. Nor has it even mentioned the ambiguity, which the court finds telling. On this record, *Terminix* does not control, and there is an absence of evidence that “the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.”<sup>432</sup> F.3d at 1332. Accordingly, all issues of arbitrability are for this court to decide.

### B. Section 2’s Requirements

Section 2 of the FAA provides that

[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

<sup>18]</sup> <sup>19]</sup>Section 2 requires a two-pronged inquiry: first,

whether there is an arbitration agreement in writing; and second, if so, whether the agreement is part of a transaction involving interstate commerce. Groome Transportation bears the burden of proving both prongs. *Univ. of S. Ala. Found. v. Walley*, No. 99cv1287, 2001 WL 237309, at \*3 (M.D.Ala. Jan. 30, 2001); *see also Williams v. Eddie Acardi Motor Co.*, No. 07cv782, 2008 WL 686222, at \*7 (M.D.Fla. Mar. 10, 2008) (“Defendant’s burden is to establish there is a valid written agreement to arbitrate.”). These prongs also are not resolved with the “thumb on the scale in favor of arbitration because the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.” *Bd. of Trs. of City of Delray Beach & Firefighters*, 622 F.3d 1335, 1342 (11th Cir.2010) (citation and internal quotation marks omitted); *see also Volt Info. Sciences, Inc. v. Bd. of Trs.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”).

<sup>10]</sup> <sup>11]</sup> The existence of a written agreement that affects interstate commerce, at least as to forty-four Plaintiffs, is in dispute. Under the summary-judgment-like procedure that applies to motions to compel arbitration, Groome Transportation initially must show that the Arbitration Agreement applies to Plaintiffs. If Groome Transportation meets that burden (as to one or more Plaintiffs), then Plaintiffs can rebut that showing with evidence establishing a genuine dispute as to whether the Arbitration Agreement was formed. And “[o]nly when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement.” *Magnolia Capital Advisors*, 272 Fed.Appx. at 785–86. “Further, as in the case of any other summary judgment, a district court considering the making of an agreement to arbitrate, should give to the [party denying the agreement] the benefit of all reasonable doubts and inferences that may arise.” *Id.* at 786 (citation and internal quotation marks omitted).

### 1. Written Agreement

\*8 <sup>12]</sup> <sup>13]</sup> <sup>14]</sup> Under the FAA, “parties cannot be forced to submit to arbitration if they have not agreed to do so.” *Chastain v. Robinson–Humphrey Co.*, 957 F.2d 851, 854 (11th Cir.1992). Thus, “the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). “Under normal circumstances, an arbitration provision within a contract admittedly signed by the

contractual parties is sufficient to require the district court to send any controversies to arbitration.”*Id.* “Under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in general.”*Id.*

Plaintiffs emphasize that Groome Transportation has submitted only one arbitration agreement that actually was signed by a Plaintiff and contends that those Plaintiffs “who did not sign an arbitration agreement will proceed in this court.” (Doc. # 18, at 12.) The gist of Plaintiffs’ contention is that, as to forty-four of the forty-five Plaintiffs, Groome Transportation has not shown that there are written agreements to arbitrate. Groome Transportation contends that the Arbitration Agreement itself is in writing, that each Plaintiff received a copy of it, and that the FAA does not contain an additional requirement that Plaintiffs must have signed the agreement. Groome Transportation relies upon *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir.2005), but *Caley* turns out not to support its position. Indeed, this case presents what no doubt is a rarity in the arbitration arena: Groome Transportation, as the proponent of arbitration, has failed to meet its burden, save one exception, of demonstrating that the parties actually agreed to arbitrate their disputes such that a trial is mandated. See *Magnolia Capital Advisors*, 272 Fed.Appx. at 785 (“Once an agreement to arbitrate is ... put ‘in issue,’ the Federal Arbitration Act (FAA) requires the district court to ‘proceed summarily to the trial thereof’ and if the objecting party has not requested a jury trial, ‘the court shall hear and determine such issue.’” (quoting 9 U.S.C. § 4)).

In *Caley*, the plaintiffs—employees who had sued their employer for violations of federal anti-discrimination statutes, including the FLSA—argued that a dispute resolution policy that contained an arbitration provision was not an “agreement in writing,” as required under § 2 of the FAA, because the employees had not signed the policy. 428 F.3d at 1368. The Eleventh Circuit held that “no signature is needed to satisfy the FAA’s written agreement requirement.”*Id.* at 1369 (referring to the FAA’s requirements of “[a] written provision,” “agreement in writing,” and “written agreement” as the “‘written agreement’ requirement”). It explained that, while the FAA requires that an arbitration provision must be “written,” there is no concomitant requirement that the “agreement to arbitrate be signed by either party.”*Id.*

\*9 In *Caley*, the dispute resolution policy was “indisputably in writing.” *Id.* The fact that the plaintiffs had not accepted its terms in writing did not preclude a finding that there was a “written agreement” because the

policy expressly provided that continuation of employment would constitute acceptance of the policy. The Eleventh Circuit explained, “Although the employees’ acceptance was by continuing their employment and was not in writing, all material terms—including the manner of acceptance—were set forth in the written [dispute resolution policy].”*Id.* The Eleventh Circuit concluded, therefore, “that the dispute resolution policy was “a written agreement to arbitrate for purposes of the FAA.””*Id.* at 1370.

<sup>151</sup> Here, as previously discussed, there is evidence that Plaintiff Annie L. Adams signed the agreement. Ms. Adams has not contested the authenticity of the signature. See, e.g., *Scone Invs., L.P. v. Am. Third Mkt. Corp.*, 992 F.Supp. 378, 381 (S.D.N.Y.1998) (finding that the movants had “satisfied their initial burden of demonstrating a written agreement obligating both plaintiffs to arbitrate by producing a copy of the customer agreement which includes an arbitration clause and which was purportedly signed by [the other party]” (citation and internal quotation marks omitted)). The burden shifts, therefore, to Ms. Adams to show that no valid contract existed and to meet that burden she must “unequivocally deny that an agreement to arbitrate was reached and must offer some evidence to substantiate the denial.” *Magnolia Capital Advisors*, 272 Fed.Appx. at 785 (citing *Chastain*, 957 F.2d at 854). Ms. Adams has not denied the authenticity of her signature or that she signed the Arbitration Agreement. Because there is no unequivocal and substantiated denial from Ms. Adams, Groome Transportation has demonstrated a written agreement between it and Ms. Adams for arbitration of her claims in this suit. This much does not appear to be in dispute.

What is in controversy is whether there is a written agreement as to the one Plaintiff who indisputably did not execute the Arbitration Agreement (Cassandra Young) and as to the other forty-three Plaintiffs for whom there is *no* evidence of a signed agreement to arbitrate. As to these forty-four Plaintiffs, Groome Transportation relies on *Caley*’s holding that the FAA does not require a signature to satisfy the written-agreement requirement, but on this record, *Caley* provides no refuge for Groome Transportation. It is true that, as in *Caley*, the Arbitration Agreement is contained in Groome Transportation’s Personnel Policy Handbook, and it also is uncontradicted that each of Groome Transportation’s employees received a copy of the handbook. See *Caley*, 428 F.3d at 1359 n. 1 (noting that the plaintiffs did not challenge the district court’s conclusion that they had “sufficient notice of the [dispute resolution policy]”). But from there, this case parts ways with *Caley*.

\*10 A determinative fact in *Caley* was that, even though the plaintiffs had not signed the arbitration agreements, the policy included a written provision that “acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the [dispute resolution policy].”*Id.* at 1365. Groome Transportation has not submitted evidence demonstrating that a similar written provision exists in this case. The closest Groome Transportation comes to providing such evidence is through Ms. Holcombe’s affidavit. Mrs. Holcombe attests that, “[a]s a condition of employment and/or continued employment, the Personnel Policy Handbook has contained a mutually binding arbitration agreement since October 19, 2012.”(Holcombe’s Aff., at ¶ 4 (emphasis added).) It is not clear, however, whether Ms. Holcombe is attesting that the handbook itself expressly states that continued employment is acceptance of the arbitration provision, and she does not elaborate. Ms. Holcombe has not cited any provision of the Personnel Policy Handbook, and the handbook is not part of the record; hence, it is unknown whether the handbook is the source of authority for Ms. Holcombe’s representation.

<sup>116]</sup> While Groome Transportation has submitted the one-page Arbitration Agreement, it does not contain a provision like the one in *Caley*. Instead, and unlike in *Caley*, the Arbitration Agreement contains signature lines for the employee and employer to acknowledge assent to arbitration, suggesting that Groome Transportation chose a signature as the method for the employee’s acceptance of the Arbitration Agreement. While *Caley* does not require the parties’ signatures as a prerequisite for a written agreement under the FAA, in *Caley* the provision that continued employment constituted acceptance of the arbitration agreement itself was in writing. Unlike in *Caley*, Groome has not submitted a writing evidencing that the Arbitration Agreement in the Personnel Policy Handbook was a “condition of employment and/or continued employment.”(Holcombe’s Aff., at ¶ 4.) *Caley* does not provide grounds from which to conclude that there is a written agreement to arbitrate because there is no evidence of a written provision memorializing that Plaintiffs were deemed to have accepted the Arbitration Agreement by continuing their employment with Groome Transportation. Ms. Holcombe’s affidavit, to the extent it concludes that further employment is acceptance of the Arbitration Agreement, is belied by the testimony of Ms. Young, who refused to sign the agreement and continued to work. Accordingly, Groome Transportation has not demonstrated a written agreement as to forty-four of the forty-five Plaintiffs.

## 2. Interstate Commerce

Plaintiffs also contend that the interstate-commerce element of § 2 is not satisfied because their employment with Groome Transportation did not involve “interstate commuting,” but instead was limited to transporting students in the immediate vicinity of Auburn’s campus. (Doc. # 18, at 2.) Groome Transportation argues that for purposes of the FAA, “the general practice of employment involves commerce, even when the employees are not engaged in interstate commerce.”(Doc. # 8, at 3.) *Caley*, on this point, supports Groome Transportation’s position.

\*11 In *Caley*, the Eleventh Circuit explained that

[t]he Supreme Court has interpreted the term “involving commerce” in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’—words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.... The Supreme Court also has clarified that “Congress” Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control.

428 F.3d at 1370 (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003)). In *Caley*, the Eleventh Circuit rejected the plaintiffs’ argument that the requisite commerce nexus under the FAA was missing because the “underlying employment relationship d[id] not affect commerce.”*Id.* It held that, “[b]ecause [the employer’s] overall employment practices affect[ed] commerce, the Commerce Clause requirement [was] satisfied.”*Id.*; see also *Williams*, 2008 WL 686222, at \*6 (explaining that, as to the commerce requirement, “[c]ourts construing the language of section 2 in the context of an employment relationship have generally focused on the nature of the defendant employer’s business, not the plaintiff employee’s individual duties”).

<sup>117]</sup> Here, like the plaintiffs in *Caley*, Plaintiffs take a “cramped view of Congress’ Commerce Clause power.”*Citizens Bank*, 539 U.S. at 58, 123 S.Ct. 2037. The issue is not whether Plaintiffs’ employment responsibilities were confined to intra-state shuttle bus services. Rather, the focus is on Groome Transportation’s overall employment practices. Although admittedly the record is skimpy on the details of Groome Transportation’s aggregate interstate-commerce effect, Plaintiffs have not countered Groome Transportation’s assertion that the “general practice of employment involves commerce, even where the employees are not

engaged in interstate commerce.”(Doc. # 8, at 3.) Moreover, contrary to Plaintiffs’ argument in their brief, the Complaint is premised on the assumption that Groome Transportation’s employment activities are “subject to federal control,” namely, the FLSA and the WARN Act, and that Groome Transportation is “engaged in commerce [for] the production of goods” as contemplated by the FLSA. (Doc. # 1, at 3, ¶ 6.) At this stage, based upon the allegations in the Complaint, the Eleventh Circuit’s decision in *Caley*, and the absence of contrary authority from Plaintiffs, the court finds that the Arbitration Agreement involves interstate commerce. If it becomes necessary, upon proper motion, the court can reexamine the issue at a later date.

### 3. Conclusion

Groome Transportation has the burden of demonstrating that § 2’s requirements are met. It has not met its burden of showing a written agreement to arbitrate as to all Plaintiffs, with the exception of Annie L. Adams. The present record is sufficient to demonstrate, however, the existence of an interstate-commerce nexus. The issue of whether there is a written agreement under § 2 goes to the “making of the arbitration agreement,” and the “making of the arbitration agreement” is “in issue” as to forty-four Plaintiffs. Accordingly, the FAA requires that “the court shall proceed summarily to the trial thereof.”<sup>9</sup> U.S.C. § 4. Because Plaintiffs have not demanded a jury trial on this issue of the making of the arbitration agreement, the court will hold a bench trial. See *Chastain*, 957 F.2d at 854–55.

### C. Enforceability of the Arbitration Agreement

\*12 Plaintiffs also challenge the enforceability of the Arbitration Agreement. They contend that, under Alabama law, the Arbitration Agreement is not a binding contract and, thus, is not enforceable. Their arguments focus on unconscionability and an alleged lack of mutual assent. These arguments presently are relevant to Plaintiff Annie L. Adams, whom Groome Transportation has demonstrated entered into an Arbitration Agreement with it. For purposes of this analysis, it will be assumed for argument only that § 2’s requirements, as discussed in the preceding subsection, are satisfied. Hence, it is appropriate at this time to address Plaintiffs’ alternative arguments challenging the enforceability of the Arbitration Agreements.

#### 1. Mutual Assent

<sup>[18]</sup> <sup>[19]</sup> <sup>[20]</sup> Courts generally should apply state law

principles governing formation of contracts. See *First Options*, 514 U.S. at 944, 115 S.Ct. 1920. Under Alabama law, Groome Transportation, as the party advocating arbitration, has the burden of showing the existence of a contract. *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983, 986 (Ala.2004). “The basic elements of a contract are an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement.” *Merchants Bank v. Head*, — So.3d —, —, 2014 WL 2242474, at \*4 (Ala. May 30, 2014) (citation and internal quotation marks omitted).

<sup>[21]</sup> <sup>[22]</sup> <sup>[23]</sup> To show the absence of a binding contract under Alabama law, Plaintiffs again point out that Groome Transportation has presented only one signed Arbitration Agreement, and that, “[i]n the absence of a signed arbitration agreement, there is no contract to arbitrate.”(Doc. # 18, at 7.) “The purpose of a signature on a contract is to show mutual assent; however, the existence of a contract may also be inferred from other external and objective manifestations of mutual assent.” *I.C.E. Contractors, Inc. v. Martin & Cobey Constr. Co.*, 58 So.3d 723, 725–26 (Ala.2010). Stated differently, assent “must be manifested by something. Ordinarily, it is manifested by a signature. However, assent may be manifested by ratification.” *Baptist Health Sys., Inc. v. Mack*, 860 So.2d 1265, 1273 (Ala.2003) (emphasis and alterations omitted). Hence, under *Baptist Health*, an employee’s signature is not the only way for an employee to assent to the terms of an arbitration agreement. In *Baptist Health*, the employer gave the plaintiff a document titled, “Dispute Resolution Program,” requiring binding arbitration and expressly providing that the employee’s continued employment manifested the employee’s acceptance of the arbitration agreement. The Alabama Supreme Court held that the employee, “by continuing her employment ... subsequent to her receipt of the Program document, expressly assented to the terms of the Program document and [was] therefore bound by the arbitration provision contained in that document.” *Id.* at 1274.

<sup>[24]</sup> Groome Transportation contends that each Plaintiff’s continued employment after receipt of the Arbitration Agreement is conduct that, under Alabama law, indicates each Plaintiff’s mutual assent to the terms of the Arbitration Agreement. Plaintiffs have not contradicted Groome Transportation’s evidence that they all received a copy of the Personnel Policy Handbook containing the Arbitration Agreement. (Holcombe’s Aff., at ¶ 4 (“Each employee receives a copy of the Personnel Policy Handbook,” which since October 19, 2012, has contained an Arbitration Agreement.)) But there is an important distinction between the facts of this case and those in

*Baptist Health*. As discussed Part V.B.1., the one-page Arbitration Agreement here does not include a written provision that stipulates that continued employment constitutes the employee's acceptance of the agreement, and Groome Transportation has not pointed to any provision in the Personnel Policy Handbook (or even submitted it) that contains such a stipulation. Rather, again, as discussed earlier in this opinion, Ms. Holcombe's attestation—that, “[a]s a condition of employment and/or continued employment, the Personnel Policy Handbook has contained a mutually binding arbitration agreement since October 19, 2012”—does not reveal whether Ms. Holcombe is attesting that the handbook itself includes an express written term that continued employment is deemed acceptance of the arbitration provision. To the contrary, in *Baptist Health*, the plaintiff indisputably received an employer-created document with an *express written* term conditioning acceptance of an arbitration agreement upon continued employment.

\*13 In sum, Groome Transportation has not submitted sufficient evidence demonstrating that it notified its employees in writing that acceptance of the Arbitration Agreement was a prerequisite for continued employment, and, thus, *Baptist Health* does not support its position. As no other arguments or authority have been advanced by Groome Transportation,<sup>8</sup> the court finds that it has not carried its burden of showing the formation of an Arbitration Agreement between it and Plaintiffs (save Annie L. Adams). The § 4 trial also will be addressed to whether under state law, the forty-four Plaintiffs gave mutual assent to binding arbitration.

## 2. Scope of the Arbitration Agreement

Plaintiffs' arguments challenging the scope of the Arbitration Agreement are twofold. Each argument is addressed in turn.

### (a) Claims that Preceded the Implementation of the Arbitration Agreement

Plaintiffs argue that the FLSA claims are not within the scope of the Arbitration Agreement because Groome Transportation's failure to pay overtime wages between April 1, 2012, and November 30, 2012, occurred prior to January 23, 2013, the date upon which the lone Arbitration Agreement was signed. (See Doc. # 18, at 6–7.) In other words, Plaintiffs contend that the Arbitration Agreement does not cover claims that arose

from conduct that took place prior to the Arbitration Agreement's implementation. But Plaintiffs cite no authority for their argument, and Groome Transportation responds that the Arbitration Agreement's use of the determiner “any” is broad enough to cover all claims—past, present, and future—and, thus, necessarily “all claims in this case.” (Doc. # 21, at 11.)

<sup>125</sup> As an initial matter, the parties do not address what body of law applies to their arguments with respect to the scope of the Arbitration Agreement. “To determine which disputes between the parties to an enforceable arbitration agreement are covered by the language of the arbitration clause, we ‘apply[ ] the federal substantive law of arbitrability,’ which is ‘applicable to any arbitration agreement within the coverage of the FAA.’” *Klay*, 389 F.3d at 1200 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). The Sixth Circuit has opined on the breadth of an arbitration clause covering “any dispute”:

When faced with a broad arbitration clause, such as one covering any dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration. Indeed, in such a case, only an express provision excluding a specific dispute, or the most forceful evidence of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.

*NCR Corp. v. Korala Assocs. Ltd.*, 512 F.3d 807, 813 (6th Cir.2008) (internal quotation marks omitted); see also *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 8 (1st Cir.2014) (observing that the presumption is “particularly appropriate” where “the arbitration is broadly worded”). This general principle—the presumption of arbitrability in the face of an expansive arbitration clause—emanates from Supreme Court precedent. See *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (In “such cases” where the arbitration agreement is “broad,” “[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”). And, in light of these principles, one district court has recognized that courts considering arbitration

provisions covering “any disputes” with no express exclusions as to the scope of the agreement “cover claims that arose before the effective date of the arbitration agreement....” *Vallejo v. Garda CL Sw., Inc.*, No. H-12-0555, 2013 WL 391163, at \*9 (S.D.Tex. Jan. 30, 2013) (collecting cases).

\*14 <sup>1261</sup> The Arbitration Agreement in Groome Transportation’s Personnel Policy Handbook is broadly worded. It applies to “any dispute, controversy or claim,” with no limitations as to its scope. The agreement has no express exclusion that precludes the parties from arbitrating past claims that pre-date the implementation of the Arbitration Agreement, and, thus, the presumption of arbitrability applies. Plaintiffs have not submitted any evidence, much less forceful evidence, that refutes the presumption. Moreover, even if there was room for debate about the meaning of “any” in the Arbitration Agreement, the presumption of arbitrability would still control and require arbitration of preexisting claims. *See Granite Rock Co. v. Int’l Broth. of Teamsters*, 561 U.S. 287, 301, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (explaining that the presumption of arbitrability will apply if “a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand”). For these reasons, Plaintiffs cannot avoid arbitration on grounds that the Arbitration Agreement does not cover past alleged employer misconduct.

### (b) Arbitration of Federal Statutory Claims

Relatedly, Plaintiffs argue that the Arbitration Agreement does not fairly apprise them that they have to arbitrate federal statutory claims. They rely upon *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir.1998). Although in *Paladino* the Eleventh Circuit held that the arbitration clause failed to give the plaintiff fair notice that the arbitration agreement covered federal statutory claims, *Paladino*’s teachings indicate that the Arbitration Agreement here does indeed bar litigation of Plaintiffs’ FLSA and Warn Act claims.

<sup>1271</sup> *Paladino* explained that an arbitration agreement does not have to “specifically list every federal or state statute it purports to cover.” *Id.* at 1059. It cited the arbitration clause in *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir.1992), which required arbitration for “any dispute, claim or controversy,” as an example of “clear language” requiring the parties to arbitrate their federal statutory claims. *Paladino*, 134 F.3d at 1059. As the Eleventh Circuit has made plain in a post-*Paladino* decision, an agreement to arbitrate “any action, dispute,

claim, counterclaim or controversy” between the parties includes the arbitration of statutory claims because “[a]ny disputes means all disputes, because ‘any’ means ‘all.’” *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir.2003) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1187 (11th Cir.1997)).

Here, the Arbitration Agreement’s language is similar to that in *Bender* and *Anders*, as it requires the parties to arbitrate “any dispute, controversy or claim.” (Ex. A to Doc. # 8.) According to *Anders*, “any” means “all,” and “all” necessarily includes federal statutory claims. Based upon this broad language, the Arbitration Agreement “generally and fairly informs the signatories that it covers statutory claims.” *Paladino*, 134 F.3d at 1059. Accordingly, the FLSA and WARN Act claims are within the scope of the Arbitration Agreement.

### 3. Unconscionability

\*15 Plaintiffs contend alternatively that, even if the making of the Arbitration Agreement were not at issue, it is “void under Alabama law as unconscionable.” (Doc. # 18, at 5.) They assert that the Arbitration Agreement is unconscionable for four reasons: (1) it requires arbitration in a Virginia forum; (2) it contains “nonsensical” language; (3) any employee who signed an arbitration agreement did so only under “extreme coercion and duress” in the face of a threat of termination; and (4) it potentially restricts them from pursuing their claims in a class action. (Doc. # 18, at 5–6.) These arguments are addressed to whether “legal constraints external to the parties’ agreement foreclose [ ] arbitration.” *Klay*, 389 F.3d at 1200.

<sup>1281</sup> <sup>1291</sup> <sup>1301</sup> <sup>1311</sup> Arbitration agreements “may be held unenforceable ... if, under the controlling state law of contracts, requiring arbitration of a dispute would be unconscionable.” *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1124 (11th Cir.2010). “Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements.” *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir.2007). “Under Alabama law, arbitration provisions are not per se unconscionable.” *Providian Nat’l Bank v. Screws*, 894 So.2d 625, 628 (Ala.2003). Instead, “unconscionability is an affirmative defense to the enforcement of a contract, and the party asserting that defense bears the burden of proving it by substantial evidence.” *Bess v. Check Express*, 294 F.3d 1298, 1306–07 (11th Cir.2002) (citing *Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409, 415, 417 (Ala.1999)). “Because Alabama law allows unconscionability to invalidate contracts generally, this defense, consistent with the FAA,

may also invalidate the arbitration agreement in this case if [the plaintiff] proves unconscionability by substantial evidence.”*Id.* at 1307. “The applicable standards for determining unconscionability are ... whether there are (1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power.”*Steele v. Walser*, 880 So.2d 1123, 1129 (Ala.2003) (citations and internal quotation marks omitted). For the reasons to follow, Plaintiffs fail to demonstrate that, to the extent that any Plaintiff and Groome Transportation entered into an agreement to arbitrate (such as in the case of Plaintiff Annie L. Adams), the Arbitration Agreement is unconscionable.

#### (a) Virginia Forum (Forum–Selection Clause)

Plaintiffs argue that “to require any member of the class defined in the Complaint to arbitrate his or her claim in Richmond[,] Virginia, separate and apart from the group that was laid off in mass, would be unconscionable and therefore, unenforceable.”(Doc. # 18, at 9.) Groome Transportation counters that Plaintiffs have failed to put forth evidence that the forum-selection clause is invalid and contends, in particular, that Plaintiffs have not shown that Virginia would be a “seriously inconvenient forum.” (Doc. # 21, at 9.)

\*16 <sup>[32]</sup> Initially, it is unclear from the scant argument and lack of citation to authority whether Plaintiffs are contending that the forum-selection clause alone is unconscionable or whether they are arguing that the Arbitration Agreement as a whole is unconscionable based upon the inclusion of the forum-selection clause. The distinction is important. As commented upon by the Second Circuit, the “Supreme Court has explained that a challenge to arbitration on the basis of unconscionability must be directed at the agreement to arbitrate itself.”*Duran v. J. Hass Grp., L.L.C.*, 531 Fed.Appx. 146, 147 (2d Cir.2013) (citing *Rent-A-Center*, 561 U.S. at 63, 130 S.Ct. 2772). Where the plaintiff “claim[s] the arbitration agreement itself [is] unconscionable due to the forum selection clause,” the court “consider[s] whether the arbitration agreement [is] unconscionable....”*Id.* Where there is a valid arbitration agreement, however, “the arbitrator, rather than the court, ... decide[s] in the first instance whether the forum selection clause [is] unconscionable.”*Id.* For purposes of this opinion, it will be assumed that Plaintiffs are contending that the Arbitration Agreement is unconscionable because it contains a forum-selection clause, rather than that the forum-selection clause alone is unconscionable. *Id.*

<sup>[33]</sup> <sup>[34]</sup> Within these parameters, the issue is whether Plaintiffs have shown that the forum-selection clause renders the Arbitration Agreement “grossly favorable” to Groome Transportation and whether Groome Transportation had “overwhelming bargaining power.” *Steele*, 880 So.2d at 1129. Plaintiffs fall short of meeting their burden. Their sole argument is that class members should not have to litigate the WARN Act claims “separate and apart from the group that was laid off in mass” (Doc. # 18, at 9), but they fail to explain how this effect renders the Arbitration Agreement so “grossly favorable” to Groome Transportation as to demonstrate unconscionability. Plaintiffs offer no authority establishing that the potential that WARN Act claims brought by former employees of Groome Transportation will proceed in different forums is grounds for invalidating an arbitration agreement. Because Plaintiffs have not demonstrated terms that are “grossly favorable” to Groome Transportation, it is unnecessary to address the unconscionability doctrine’s second element addressed to bargaining power. It is noteworthy though, that as emphasized by the Alabama Supreme Court, under U.S. Supreme Court precedent, “ [m]ere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Gayfer Montgomery Fair Co. v. Austin*, 870 So.2d 683, 691 (Ala.2003) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)). Accordingly, Plaintiffs’ argument that the forum-selection clause renders the Arbitration Agreement unconscionable is not persuasive.

#### (b) Nonsensical Language

\*17 <sup>[35]</sup> Plaintiffs next contend that the wording of the Arbitration Agreement “commingles the distinctly different processes of mediation and arbitration.”(Doc. # 18, at 7–8.) They point to the following provision: “Arbitration shall be administered and conducted under the Mediation Rules by mediators of the American Arbitration Association.” Plaintiffs argue that this language creates an ambiguity as to whether the agreement is “an agreement to mediate or an agreement to arbitrate,” and that “[a]n arbitration agreement that is nonsensical as to rules under which the arbitration is to be conducted is unenforceable.”(Doc. # 18, at 8.)

Groome Transportation responds that the intent of the parties is the key inquiry and points to a different provision of the Arbitration Agreement that it says clearly shows the parties’ intent to arbitrate. That provision reads: “[E]ach party fully understands and agrees that they are

giving up certain rights otherwise afforded to them by civil court actions, including but not limited to a jury trial.”(Doc. # 21, at 5.) Groome Transportation contends that Plaintiffs cannot unwind the Arbitration Agreement “by quoting one sentence from the agreement.”(Doc. # 21, at 5.)

Determining the parties’ intent is a question of law for the court.*Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1058 (11th Cir.1998). Groome Transportation relies upon *Sheet Metal Workers’ International Association Local 15, AFL–CIO v. Law Fabrication*, 237 Fed.Appx. 543 (11th Cir.2007). In *Sheet Metal Workers’*, the arbitration clause contained a typographical error—“of” inadvertently was inserted instead of “or.”<sup>10</sup>*Id.* at 547–48. Notwithstanding that “the language read literally [was] nonsensical” given the typographical error, the Eleventh Circuit concluded that “the intent of the parties [was] perfectly clear from the face of the agreement” and that the arbitration clause was enforceable.*Id.* at 548.

<sup>136]</sup> The face of the Arbitration Agreement, although it includes two references to mediation, also discloses terms evidencing an intent to arbitrate. The Agreement expressly commits the parties to resolve disputes through “binding arbitration.” The parties’ intent to submit their disputes to arbitration further is revealed (1) in the title of the agreement, “Arbitration Clause and Agreement,” (2) by the inclusion of the AAA’s telephone number for an employee to obtain answers to “questions about the arbitration process,” (3) by the language requiring that the AAA rules govern “[d]iscovery in any arbitration proceeding,” and (4) by the acknowledgment that the “agreement to arbitrate is freely negotiated.” Additionally, the agreement expressly sets out that it constitutes a waiver of the right to a jury trial in a court action. The waiver of the right to a jury trial is consistent with an agreement to arbitrate, not an agreement to mediate. *See Cooper v. MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir.2004) (“If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.”).

\*18 Moreover, no Plaintiff presents facts that suggest the parties intended not to arbitrate their disputes. For example, no Plaintiff submits evidence that he or she did not understand the agreement to encompass arbitration or that he or she inquired about the meaning of the agreement. The sole plaintiff-affiant refers unambiguously to the agreement nine times as an “arbitration agreement” and does not indicate any confusion as to whether Groome Transportation was asking her to mediate instead of to arbitrate disputes. (*See, e.g., Young’s Aff.*, at 2 (“I was presented an arbitration

agreement for my signature...”).) Unfortunately for Plaintiffs, in the arbitration arena, any ambiguity created by the two references to “mediation” and “mediator” in one sentence of the agreement has to be construed in favor of arbitration. *See generally EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (“[A]mbiguities in the language of the agreement should be resolved in favor of arbitration ...”); *see also Pacheco v. PCM Const. Servs., LLC*, No. 12cv4057, 2014 WL 145147, at \*5 (N.D.Tex. Jan. 15, 2014) (“[T]o the extent Plaintiffs contend that the arbitration provision is ambiguous because its inclusion of the words “arbitración” and “mediación,” the court must construe any such ambiguity in favor of arbitration.”) (citing *Klein v. Nabors Drilling USA, L.P.*, 710 F.3d 234, 237 (5th Cir.2013)). The provision of the Arbitration Agreement that Plaintiffs point out no doubt is poorly drafted, admittedly much more so than the typographical error in *Sheet Metal Workers’*. In the end, though, Plaintiffs’ argument that the Arbitration Agreement’s terminology is confusing and renders the agreement unconscionable lacks support in the Arbitration Agreement itself, the evidence, and the law.

### (c) Duress

<sup>137]</sup> Plaintiffs argue that any employee who signed an Arbitration Agreement did so under the threat of termination and that, therefore, the agreement was formed under duress and is unconscionable. The Supreme Court of Alabama’s decision in *Potts v. Baptist Health System, Inc.*, 853 So.2d 194 (Ala.2002), forecloses this argument. In *Potts*, the court rejected the employee’s argument that her employer’s demand that she sign an acknowledgement form accepting arbitration as the means for resolving legal disputes or face termination, rendered the arbitration agreement unconscionable. *See id.* at 204–07. “[T]he possibility of termination flowing from [the plaintiff’s] refusal to sign an acknowledgement form is not, in and of itself, unconscionable.”*Id.* at 206. The plaintiff presented no evidence, other than her employer’s threat of termination, and, thus, the court was “unable to conclude that the circumstances surrounding [the plaintiff’s] acceptance of continued employment with the defendants were unconscionable.”*Id.* at 207; *see also Williams v. Parkell Prods., Inc.*, 91 Fed.Appx. 707, 708 (2d Cir.2003) (“It is well-settled ... that conditioning employment on the acceptance of an agreement to arbitrate disputes, including those arising under civil rights laws, is not itself unlawfully coercive.”) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123–24, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)).

\*19 As in *Potts*, Plaintiffs rely solely upon Groome Transportation's threat of termination if they did not sign an Arbitration Agreement, and that simply is not enough under Alabama law to demonstrate unconscionability. Accordingly, Plaintiffs' argument that the Arbitration Agreement is unconscionable because any Plaintiff who executed one did so under duress is rejected.

#### (d) Class–Action Preclusion

Plaintiffs argue that any restriction in the Arbitration Agreement on their right to pursue a class action is unconscionable under Alabama law. They contend that the Arbitration Agreement does not explicitly inform them that they have “to arbitrate the statutory right to a class remedy provided in the WARN Act.”(Doc. # 18, at 9.) The Arbitration Agreement's silence on this issue, according to Plaintiffs, means that they are under “no obligation ... to arbitrate these statutory claims.”(Doc. # 18, at 9.) Plaintiffs rely on *Paladino*, but as explained below, that reliance is misguided. Plaintiffs further contend that two Eleventh Circuit decisions holding class-action waivers unconscionable under Georgia law require the same result under Alabama law and that a finding of unconscionability is even stronger here because the Arbitration Agreement does not contain a class-action waiver. But Plaintiffs' reliance on these decisions also is unavailing, and Plaintiffs omit discussion of important Supreme Court decisions.

<sup>138]</sup> It is helpful initially to address the effect of a valid arbitration agreement's silence as to the availability of class-wide relief *in the arbitrable forum*. Under Alabama law, “classwide arbitration is permitted only when the arbitration agreement provides for it.”*Taylor v. First N. Am. Nat'l Bank*, 325 F.Supp.2d 1304, 1320 n. 28 (M.D.Ala.2004) (citing *Med. Ctr. Cars, Inc. v. Smith*, 727 So.2d 9, 20 (Ala.1998)); see also *Hornsby v. Macon Cnty. Greyhound Park, Inc.*, No. 10cv680, 2012 WL 2135470, at \*9 (M.D.Ala. June 13, 2012) (explaining that, because the arbitration agreement “says nothing about classwide arbitration,” Alabama's “default rule, that ‘classwide arbitration is permitted only when the arbitration agreement provides for it,’ kicks in.”) (quoting *Taylor*, 325 F.Supp.2d at 1320 n. 28). Based upon these authorities, if Plaintiffs ultimately are required to arbitrate their disputes, class-wide arbitration would be unavailable because the Arbitration Agreement does not expressly provide for it.

<sup>139]</sup> Moreover, and more to the point for purposes of this

opinion, the fact that there is no class-action vehicle available to Plaintiffs in the arbitral forum does not mean, as Plaintiffs contend, that the Arbitration Agreement is unenforceable and that class litigation is available in a judicial forum. As the district court highlighted in *Hornsby*, “the Eleventh Circuit has held that arbitration clauses are enforceable even when their application may effectively prevent plaintiffs from pursuing their claims as a class action.”2012 WL 2135470, at \*9 (citing *Caley*, 428 F.3d at 1378, which rejected the plaintiffs' argument that the arbitration agreement was unconscionable under Georgia law because it “preclude[d] class actions”). And post-*Caley*, the Supreme Court has ruled that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so” and that consent to class arbitration cannot be inferred where the agreement is silent as to the availability of class-action procedures. *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010).

\*20 <sup>140]</sup> Notwithstanding the foregoing authorities, Plaintiffs portend that *Paladino* supports their position that they may proceed in this court with a class action. They point to *Paladino*'s holding that “a mandatory arbitration clause does not bar litigation of a federal statutory claim, unless ... the agreement [ ] authorize[s] the arbitrator to resolve federal statutory claims....”134 F.3d at 1059 (citation and internal quotation marks omitted). Plaintiffs argue that, because the Arbitration Agreement does not expressly give the arbitrator authority to resolve federal statutory claims *on a classwide basis*, *Paladino*'s “rules for dealing with statutory claims ... have not been met.”(Doc. # 18, at 9.) But Plaintiffs' argument confuses a procedural vehicle (the class action) with the substantive statutory claim (the WARN Act claim). “[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”*Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (citing Fed.R.Civ.P. 23). And “[t]he availability of the class action Rule 23 mechanism *presupposes* the existence of a claim.”*Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir.2013).*Paladino* addressed what is required for an arbitration agreement to cover federal statutory *claims*, not what is required for an arbitration agreement to establish a procedural right to a class action for the vindication of those statutory claims. *Paladino* simply is inapposite for the point Plaintiffs attempt to make.

Plaintiffs' next argument—that the Arbitration Agreement is unconscionable because it effectively precludes

class-action procedures—relies on two Eleventh Circuit decisions that held that an arbitration agreement’s waiver of the right to proceed with a class action was unconscionable under Georgia law.<sup>11</sup> (Doc. # 18, at 9) (citing *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir.2007), and *Jones v. DirecTV, Inc.*, 381 Fed.Appx. 895 (11th Cir.2010).) Specifically, Plaintiffs quote *Jones*’s discussion preceding its holding that the class-action waiver at issue was unconscionable under Georgia law:

The district court denied the motion to arbitrate filed by DirecTV. The district court ruled that the waiver of the right to represent a class in Jones’s agreement was unconscionable based on our decision in *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir.2007). The district court reasoned that *Jones* and the class she sought to represent would have little incentive to pursue arbitration based on “the limited potential recovery” available. We held in *Dale* that a waiver of a class action in an arbitration agreement is unconscionable under Georgia law when the “cost of vindicating an individual subscriber’s claim ... is too great.”*Id.* at 1224. We explained that several factors are relevant in determining the enforceability of a waiver of a class action, including the “fairness of the provisions,” the cost of individual arbitration in comparison to the potential recovery, the likelihood that attorney’s fees and expenses could be recovered, the power the waiver gave the company “to engage in unchecked market behavior,” and “related public policy concerns.” *Id.* We ruled that the waiver of a class action in the Comcast contract was unconscionable because it undermined a public policy favoring the pursuit of small-value claims to deter companies from misconduct and discouraged arbitration by consumers who sought small judgments, but bore significant costs and would otherwise experience difficulty obtaining representation. *Id.*

\*21 *Id.* at 896.

Plaintiffs contend that the economic-feasibility, Georgia-law principles discussed in *Dale* and *Jones* “also are expressed in Alabama law” in *Leonard v. Terminix International Co.*, 854 So.2d 529, 536–37 (Ala.2002). At issue in *Leonard* was whether an arbitration agreement that precluded resolution of disputes through class-action procedures was unconscionable under Alabama law. The *Leonard* court concluded that the arbitration agreement between a pesticide company and a homeowner was “unconscionable by reason of economic feasibility.”<sup>854</sup> So.2d at 537. The value of each plaintiff’s claim was small (less than \$500), but the baseline amount of fees required of the plaintiffs in arbitration would have been \$1,150. *Id.* at 535. The Alabama Supreme Court held that

the “arbitration agreement [was] unconscionable” because the plaintiffs’ “expense of pursuing their claim far exceed[ed] the amount in controversy,”*id.* at 539. Moreover, because the agreement precluded recovery for “indirect, special, and consequential damages or loss of anticipated profits” and foreclosed class-action procedures, the plaintiffs were “deprive[d] ... of a meaningful remedy.”*Id.* at 538. The arbitration agreement was, therefore, unenforceable.

Plaintiffs argue that Alabama’s law on unconscionability parallels Georgia’s law and that, therefore, *Dale* and *Jones* require invalidation of the Arbitration Agreement. They contend that each individual Plaintiff’s potential recovery under the FLSA is for “a relatively small sum of money,” and, thus, the denial of the class-action vehicle will “effectively insulat[e]” Groome Transportation from liability. (Doc. # 18, at 11.)

At first blush, these decisions appear to support Plaintiffs’ position, but *Dale* and *Jones* predate the Supreme Court’s decisions in *AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Restaurant*, —U.S. —, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). *Concepcion* and *Italian Colors* provide the appropriate starting point for addressing Plaintiffs’ arguments, even though Plaintiffs neglect to mention them.

In *Concepcion*, the plaintiffs, individually and as proposed representatives of a class, filed a lawsuit in federal court alleging that AT & T Mobility had “engaged in false advertising and fraud by charging sales tax on phones it advertised as free.”<sup>131</sup> S.Ct. at 1744. AT & T Mobility moved to compel arbitration based upon the parties’ agreement, but the plaintiffs countered that the arbitration agreement was unconscionable because it contained a class-action waiver that effectively “ ‘exempt[ed] ... [AT & T Mobility] from responsibility for [its] own fraud.’ ”*Id.* at 1746 (quoting *Discovery Bank v. Superior Ct.*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1110 (2005)). The lower courts agreed and held that the class-action waiver was unconscionable under applicable California law. The Supreme Court granted certiorari to decide whether the saving clause in § 2 of the FAA “preempt[ed] California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable.”*Id.*; see also § 2 (providing that arbitration agreements are enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.” (“saving clause”)).

\*22 The plaintiffs argued that California’s rule (*i.e.*, “the

*Discover Bank* rule”) fell within the saving clause and invalidated the arbitration agreement. Addressing this argument, the Supreme Court explained how the FAA’s preemptive force works. “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Concepcion*, 131 S.Ct. at 1747. “But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as ... unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.” *Id.* In the end, “[a]lthough § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 1748. The Court concluded that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA,” and that, therefore, the FAA preempted California’s *Discovery Bank* rule. *Id.* Accordingly, it held that the arbitration agreement should have been enforced.

In this case, Plaintiffs’ argument, distilled to its essence, is that the Alabama Supreme Court’s opinion in *Leonard* supplies a rule of unconscionability that “exist[s] at law or in equity for the revocation of any contract” under § 2’s saving clause. 9 U.S.C. § 2. Another judge of this court in the post-*Concepcion* era addressed essentially the same argument that Plaintiffs make and succinctly framed the issues as follows: “[W]hether (1) Alabama’s unconscionability doctrine as applied in *Leonard*... governs this case and (2) if so whether, under *Concepcion*, this rule impermissibly conflicts with the purposes of the FAA.” *Hornsby*, 2012 WL 2135470, at \*7. The Arbitration Agreement is not unconscionable for the same reason that the *Hornsby* arbitration agreement was not (simply stated, because *Leonard* does not govern), and the well-reasoned analysis in *Hornsby* streamlines the present analysis. Three points support this conclusion.

<sup>[41]</sup> First, the Arbitration Agreement contains no limitations on the recovery of damages. *See id.* at \*8 (“[C]ourts have uniformly rejected *Leonard*-based unconscionability challenges where there was no restriction on damages or other sorts of remedy.” (collecting cases)). Second, while Plaintiffs contend that their potential recoveries are limited under the WARN Act to sixty days in wages and that the potential recovery under the FLSA may “be even smaller,” (Doc. # 18, at 10), they make no contention, as did the plaintiffs in *Leonard*, “that their potential recovery in arbitration will be necessarily smaller than the amount they will be required to spend just to arbitrate the

case....” *Hornsby*, 2012 WL 2135470, at \*9. Where there is not “economic-unfeasibility,” the facts fall “well outside of *Leonard*’s core concern.” *Id.* (internal quotation marks omitted). Third, Plaintiffs rely largely on a policy argument—that class-action litigation provides a less burdensome vehicle for prosecuting their claims. (*See* Doc. # 18, at 10–12.) But, as the court put it in *Hornsby*, the fact that it may “be more efficient to proceed as a class” is not to say that the prohibition of class-action procedures is unconscionable under Alabama law. 2012 WL 2135470, at \*9. The Supreme Court’s decision in *Italian Colors*, decided after *Hornsby*, further confirms that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”<sup>12</sup> 133 S.Ct. at 2312 n. 5.

\*23 Based on the foregoing, the Arbitration Agreement is not unconscionable under *Leonard* and, therefore, *Leonard* does not govern the outcome here. As in *Hornsby*, which reached the same conclusion, the court finds that it is unnecessary to reach the second issue concerning whether *Leonard* “impermissibly conflicts with the purposes of the FAA” so as to be preempted. *Hornsby*, 2012 WL 2135470, at \*7. But it is notable that Plaintiffs’ ability to survive an FAA preemption argument is called into question not only by *Concepcion*, but also by *Italian Colors*. In *Italian Colors*, each class member’s maximum statutory recovery would have been \$38,549, while the cost of proving the claims would have been at least several hundred thousand dollars and potentially over a million dollars. While the plaintiffs might have “no economic incentive to pursue their antitrust claims individually in arbitration,” the Court held the class-action waivers enforceable. Although not an FAA preemption case as in *Concepcion*, the *Italian Colors* Court noted that *Concepcion* had “all but resolve[d] this case” because that decision “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’ ” 133 S.Ct. at 2312. Indeed, the Court went so far as to state in a footnote that *Concepcion* was not solely a preemption decision but one that “established ... that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.” *Id.* at 2312 n. 5. In sum, the court rejects Plaintiffs’ contention that any restriction in the Arbitration Agreement on the right to pursue a class action is unconscionable under Alabama law.

## VI. CONCLUSION

At issue is whether the forty-five Plaintiffs entered into

valid Arbitration Agreements requiring them to arbitrate their FLSA and WARN Act claims against Groome Transportation. As to one Plaintiff, Annie L. Adams, she signed an Arbitration Agreement that is enforceable. There is no evidence of any defects to the agreement's formation, such as lack of mutual assent, and Ms. Adams's disputes fall within the scope of that agreement. Furthermore, Ms. Adams has not shown grounds for revocation of the Arbitration Agreement for reasons of unconscionability or duress. Accordingly, it is ORDERED that Groome Transportation's motion to compel arbitration (Doc. # 8) is GRANTED as to Plaintiff Annie L. Adams. Pursuant to 9 U.S.C. §§ 3-4, Plaintiff Annie L. Adams is ORDERED to submit this dispute to arbitration in the manner provided for in the arbitration clause. Ms. Adams's action will be STAYED pending arbitration. Ms. Adams shall file a jointly prepared report regarding the status of arbitration proceedings on or before **November 17, 2014**, and every ninety (90) days thereafter, until this matter is resolved.

It is further ORDERED that, as to the remaining forty-four Plaintiffs, there exists a genuine dispute as to the making of arbitration agreements. Accordingly, as to these forty-four Plaintiffs, a bench trial is set pursuant to 9 U.S.C. § 4 on **September 16, 2014, at 9:00 a.m.**, in courtroom 2-B of the Frank M. Johnson, Jr. U.S. Courthouse Complex, One Church Street, Montgomery, Alabama. The § 4 bench trial will be limited to whether there is an Arbitration Agreement in writing, as required by 9 U.S.C. § 2, and whether under state law, these forty-four Plaintiffs gave mutual assent to binding arbitration, as discussed in Part V.B.1. and Part V.C.1. of this opinion.

\*24 The Clerk of the Court is DIRECTED to provide a court reporter for the bench trial.

Footnotes

- 1 This alleged "loop-hole run," as Plaintiffs call it, is set out in detail in the Complaint. (See Compl. ¶¶ 20-32.)
- 2 Plaintiffs have not addressed this argument, which was raised in Groome Transportation's reply brief. Although new arguments in a reply brief need not be considered, Groome Transportation's new argument does not necessitate a surreply and consideration of the argument is in the interest of judicial efficiency.
- 3 The Eleventh Circuit in *Terminix* also accessed [www.adr.org](http://www.adr.org) because the rules were not included in the appeal record. See 432 F.3d 1333 n. 5.
- 4 There is a fundamental, categorical difference between mediation and arbitration. Though mediation is usually more flexible and can even, by agreement of the parties, be binding, it is by no means the equivalent of arbitration.
- 5 Plaintiffs also argue that Groome Transportation threatened to fire any employee who refused to sign the Arbitration Agreement. In Plaintiffs' words, "[t]he use of fear of termination in order to manipulate employees to sign arbitration agreements shows a lack of mutual assent." (Doc. # 18, at 7.) The argument boils down to the contention that any Plaintiff who signed an arbitration agreement did so under coercion or duress. This argument is analyzed in the next part addressing Plaintiffs' unconscionability arguments.
- 6 The issue of whether there is a written agreement under the FAA, which was addressed in Part V.B.1, and whether there is a binding contract under state law are separate issues. See *Caley*, 428 F.3d at 1369 n. 10 (The Eleventh Circuit explained that, "[w]hether continued employment can constitute acceptance of a contractual offer, and thus whether the [arbitration agreement] is a binding contract, is a different contract issue [than whether there is a written agreement to arbitrate, which is] to be decided under state law."). Although the analysis on its face appears redundant with that in Part V.B.1., because the former issue is a matter of federal law and the latter a matter of state law, the issues require separate analysis, even though in this case the factual predicate and the result are the same.
- 7 The employee in *Baptist Health* also signed an acknowledgement form, but the holding did not turn on that fact.
- 8 It is worth noting again that the Arbitration Agreement contains signature lines for the employee and employer to sign to acknowledge assent to arbitration. Under comparable circumstances, a district court applying Florida law refused to "infer acceptance of the arbitration agreement from Plaintiff's acceptance of employment with Defendant." *Schoendorf v. Toyota of Orlando*, No. 08cv767, 2009 WL 1075991, at \*8 (M.D.Fla. Apr. 21, 2009). As in this case, the arbitration agreement did not define acceptance as continued employment. *Id.* Rather, the agreement provided spaces for signatures, and, "in this way, the arbitration agreement defined the appropriate method of acceptance as the signatures of the parties." *Id.*

- 9 Groome Transportation relies upon Alabama law, but with no explanation.
- 10 The typographical error in the arbitration agreement provided that “the obligation to arbitrate is triggered when there is a deadlock in ‘negotiations for a renewal of this Agreement of [sic] negotiations regarding a wage/fringe reopener.’”*Sheet Metal Workers*, 237 Fed.Appx. at 547–48.
- 11 Plaintiffs recognize that the Arbitration Agreement here “contains no waiver of [ ] the right to participate in a class action at all—let alone a waiver of the action ... [,]” but they argue “even if there were an agreement not to participate in a class action, the agreement would be unconscionable and unenforceable.”(Doc. # 18, at 10.)
- 12 The Supreme Court’s decision in *Italian Colors* also exposes a potential flaw in Plaintiffs’ argument that the “presence of the class action language in the WARN Act” is a factor that “leads inexorably to the conclusion that all of the aggrieved employees have the right to participate in this class action.”(Doc. # 18, at 10–11; *see also* Doc. # 18, at 6 (“The WARN Act, by its terms, anticipates a class action, and to order arbitration would effectively preclude the class remedy provided by Statute.”).) In *Italian Colors*, the Court explained that, in a prior decision, it “had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions.” 133 S.Ct. at 2311 (citing *Gilmer*, 500 U.S. at 20, 111 S.Ct. 1647).

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2014 WL 3695493

Only the Westlaw citation is currently available.  
United States District Court, D. Oregon.

William DAVIS and W.M.D. Consulting, LLC,  
Plaintiffs,

v.

CASCADE TANKS LLC, Cascade Companies LLC,  
Balusa Holdings, Inc., Macgreco Investments  
Limited, Tritoria Investments Limited, and Pieter  
Van Der Staal, Defendants.

No. 3:13-CV-02119-MO. | Signed July 24, 2014.

#### Attorneys and Law Firms

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S. Ward Greene, David A. Foraker, Sanford R. Landress, Greene & Markley, P.C., Portland, OR, for Defendants.

#### OPINION AND ORDER

MICHAEL W. MOSMAN, District Judge.

\*1 This is a suit for breach of fiduciary duty, minority shareholder oppression, intentional interference with economic relations, and for an accounting. (Complaint [1–1].) Suit was brought by Plaintiffs William Davis (“Mr. Davis”) and W.M.D. Consulting, LLC (“WMD”) against Cascade Tanks, LLC (“Cascade Tanks”), various other entities in the corporate group of which Cascade Tanks is a part, and various individuals who were officers or directors of these entities during the relevant time. The suit was filed in Multnomah County Court on March 1, 2013, and was removed to this Court on November 27, 2013, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, codified at 9 U.S.C. § 201–208 (the “Convention”). Plaintiffs filed a motion to remand [14] and Defendants filed a motion for stay pending arbitration [55, 57–1].

As explained on the record [69] and set out in my prior order [74], I DENIED the motion for remand, finding that this Court has jurisdiction to determine the enforceability of the arbitration agreement. Turning to the motion for

stay, I concluded that the arbitration agreement at issue is enforceable under the Convention, and therefore stayed the case pending arbitration. (Order [74].) I now formally explain my rulings.

#### BACKGROUND

##### I. Corporate Structure of the Parties

The parties have submitted evidentiary support for their respective motions. According to this evidence and the Complaint [1–1], the facts in which I take as true, the basic structure of the corporate group is as follows: Mr. Davis is the sole member of WMD. WMD owns twenty five percent of the shares of Defendant Macgreco Investments, Ltd., (“Macgreco”), a Cyprus corporation. *See* Armstrong Decl. [17] Ex. 3. The other seventy five percent of Macgreco is owned by Defendant Tritoria LLC, a Cyprus LLC, and Trio Group Investments, a Bahamas entity. *Id.* These two entities are allegedly controlled by a combination of Defendant Mr. van der Staal and other individuals, dubbed “the Norwegian Investors” by Plaintiffs. (Pl.’s Mem. in Supp. Mot. to Remand [15] at 3.)

Macgreco holds all shares in Defendant Balusa Holdings, Inc., a Nevada corporation, which in turn wholly owns Defendant Cascade Tanks. *See* Armstrong Decl. [17] Ex. 3. Cascade Tanks is an oilfield fluid handling supply and service business. (Davis Decl. [17–2] ¶ 4.) Defendant Cascade Companies LLC is a now-dissolved corporation that was once the parent company of Cascade Tanks. (Armstrong Decl. [17] Ex. 3.)

Mr. Davis was General Manager of Cascade Tanks until his termination on February 15, 2013. (Compl. [1–1] ¶ 31; Davis Decl. [17–2] ¶ 4–5.) He was paid a significant salary, and ownership shares in Cascade Tanks were also part of his compensation. (Compl. [1–1] ¶¶ 16, 19–20, 23–24.) His employment was governed by an Employment Agreement that is not at issue in this suit. (Compl. [1–1] ¶ 22; Armstrong Decl. [17] Ex. 7.) In this case, he brought suit in his capacity as a minority shareholder of Defendants Balusa and/or Macgreco, interests which he holds through WMD. (Compl. [1–1] ¶¶ 1–31, 69.)

\*2 It is alleged that during the restructuring that ultimately resulted in the corporate structure described above, Mr. Davis signed, on behalf of WMD, a Stock

Buy-Sell Agreement related to Balusa Holdings. (Compl. [1-1] ¶ 23; Armstrong Decl. [17] Ex. 6.) This agreement provided for binding arbitration in Nevada. (Armstrong Decl. [17] Ex. 6 at 18-19.) Before signing this agreement, Mr. Davis consulted with his attorney. (Davis Decl. [17-2] ¶ 13.) It is Mr. Davis's position that this agreement took effect and WMD thereby held shares in Balusa throughout 2011 and 2012. (Pl.'s Mem. [15] at 5.)

Defendants contend that the Balusa Agreement never took effect. Their position is that after the Balusa Agreement was signed but before it was put into effect, (and thus before WMD took ownership of any Balusa shares), it was determined that elements of the corporate structure should be moved offshore for tax reasons. Thus, Defendant Macgreco, later made the parent company of Balusa, was purchased. Defendants submit evidence supporting the inference that WMD quitclaimed any interest in Balusa. (Dueck Decl. [30] Ex. 1.) Mr. Davis then signed a new agreement, the Macgreco Stock Buy-Sell Agreement (the "Macgreco Agreement"), on its behalf. (Compl. [1-1] ¶ 25; Not. of Removal [1-1] Ex. B.)

In proposing that the Macgreco Agreement replace the Balusa Agreement, Defendant Mr. van der Staal explained to Mr. Davis in an email that the new agreement was essentially the same as the former, except for two changes: "1. It shifts the competent court to [C]yprus, to ensure that the entire jurisdiction is offshore; and, 2. The references to 'Balusa' are replaced with 'Macgreco.'" (Armstrong Decl. [17] Ex. 11 at 1.) The email containing these representations was sent on January 3, 2012. *Id.* at 1. A subsequent email, sent January 24, 2014, reiterated that "the document we sent you is the same as the one you previously signed, with only one significant change—namely that the agreement is subject to Cyprus law." *Id.* at 2.

Mr. Davis declares that he received the documents in August 2012, but "did not sign all of the documents until December 2012 because [he] wanted more information about the transaction." (Davis Decl. [17-2] ¶ 29.) However, he also declares that he "did not ask [his] lawyer to review the agreement" because he "relied on the representations ... that the Macgreco agreement was 'the same deal' as the Balusa buy-sell agreement." *Id.* ¶ 25.

## II. The Foreign Arbitration Agreement

Defendants removed to this Court under the Convention on the grounds that the lawsuit relates to a foreign arbitration agreement found in the Macgreco Agreement. (Not. of Removal [1] ¶ 2.) The Macgreco Agreement's

arbitration clause reads as follows:

10.15 Arbitration. Except as otherwise provided herein, any dispute or controversy arising out of or relating to this Agreement (including its execution or the construction or enforcement of its terms) shall be determined by arbitration with the competent courts of Cyprus Limassol who shall have jurisdiction to settle any disputes, which may arise out of or in connection with this Agreement and that accordingly any suit action or proceeding arising out of or in connection with the Agreement may be brought in such courts.

\*3 Upon filing of an action, each party agrees to undertake good faith efforts to agree upon an arbitrator within thirty (30) days after the deadline for filing of the answer to the complaint in question. If, despite such good faith efforts, the parties are unable to agree upon an arbitrator, each party such submit to the court ... a maximum of three (3) arbitrators who meet the foregoing conditions for consideration, and the court shall decide upon the arbitrator from the potential arbitrators submitted to the court. Each party to the Action shall be responsible equally for the arbitrator's fees. The decision of the arbitrator shall be final and binding upon all parties.

(Not. of Removal [1] Ex. B at 16.)

## III. The Underlying Claims

Plaintiffs' claims are for breach of fiduciary duty, minority shareholder oppression, intentional interference with economic relations, and for an accounting. (Complaint [1-1] ¶¶ 36-77.) Among other things, Plaintiffs allege that a Mr. Dueck (one of the "Norwegian Investors," who has been dismissed as a defendant by the state court) and others authorized "suspect loan transactions" through which Balusa would borrow money from a nonprofit entity controlled by himself and other "Norwegian Investors" at high interest rates, thus transferring profits out of the Cascade Tanks corporate family. (Pl.'s Mem. [15] at 5; Davis Decl. [17-2] ¶ 18.) Another basis for the claims is that the "Norwegian Investors" caused an unspecified Defendant entity to enter into fraudulent "consulting" transactions, through which they paid other entities in which the "Norwegian Investors" have an interest for consulting services never actually performed. (See Davis Decl. [17-2] ¶ 32.) Mr. Davis argues that his interest in Cascade Tanks, held through Macgreco and Plaintiff WMD, has been and is being devalued by Defendants' actions.

## LEGAL STANDARDS

The district courts have removal jurisdiction over any suit which “relates to” an arbitration agreement “falling under the Convention.” 9 U.S.C. § 205. “[W]henver an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit.” *Infuturia Global Ltd. v. Sequus Pharms, Inc.*, 631 F.3d 1133, 1138 (9th Cir.2011) (emphasis omitted) (quoting *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir.2002)).

Federal courts recognize “the emphatic federal policy in favor of arbitral dispute resolution,” a policy that “applies with special force in the field of international commerce.” *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985). The Supreme Court has explained that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Although the Convention’s implementing legislation is codified as part of the Federal Arbitration Act (“FAA”), its terms differ in some significant ways. See 9 U.S.C. § 208 (“Chapter 1 [of the FAA] applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States”). The Convention provides that “the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall ... refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” Convention art. II(3), 21 U.S.T. 2517. In contrast, the FAA allows a party to resist arbitration on “such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

## DISCUSSION

### I. Removal Jurisdiction

\*4 Plaintiffs contend that this court lacks removal jurisdiction because the arbitration clause is “unenforceable under the Convention based on traditional contract defenses under the common law of the United States.” (Pl.’s Mem. [15] at 12.) Defendants argue that the jurisdictional inquiry is more limited, and that the substantive enforceability of the arbitration agreement is relevant not to jurisdiction, but to whether the court

should go on to enforce the agreement and stay the action in favor of arbitration. (Def.’s Resp. [27] at 1.) As explained on the record, I agree with Defendants’ reading of the Convention’s text and the case law interpreting it.

As with any removed case, the Court’s first inquiry is whether there is a statutory grant of federal jurisdiction. Here, Defendants’ basis for removal is 9 U.S.C. § 205. In order to determine whether 9 U.S.C. § 205 provides jurisdiction in this case, the Court must answer two questions: (1) whether there is an arbitration agreement (or award) that “fall[s] under the Convention,” and (2) whether “the subject matter of an action or proceeding pending in a State court relates to” that arbitration agreement. 9 U.S.C. § 205. Only if removal is proper does the court turn to the merits of enforcement.

Plaintiffs argue that more is required. I disagree—that the jurisdictional inquiry is separate from the merits of enforcement is required by the text of the Convention and the provisions in which it is implemented. The Convention provides that a court, “when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” Convention art. II(3), 21 U.S.T. 2517. The text contemplates that only a court “seized of” the suit will turn to the question whether the arbitration clause shall be enforced. As used in article II(3), the phrase “seized of” means that the court is “in possession of” the action.<sup>1</sup> See 14 *Oxford English Dictionary* 896 (J.A. Simpson & E.S.C. Weiner eds., 2d ed.1989); *Black’s Law Dictionary* 1524 (Rev. 4th ed.1968). As explained below, a federal court cannot be “seized of an action” under this provision in the absence of federal jurisdiction, which is granted in 9 U.S.C. §§ 203 and 205.

One commentator has observed that “[t]he Convention’s text is drafted in broad terms, designed for application in a multitude of states and legal systems ... the Convention imposes uniform international standards while leav[ing] a substantial role for national law and national courts to play in the arbitral process.”<sup>2</sup> Congress did not individually codify many of the Convention’s provisions, which apply on their own terms under 9 U.S.C. § 201.<sup>3</sup> In implementing the treaty, however, Congress did fill in U.S. law—specific gaps in the Convention’s provisions.<sup>4</sup> Naturally, the Convention itself does not specify jurisdictional requirements, as these would differ between the many signatory states. See *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044, 1051–52 (N.D.Cal.1977) (observing that the Convention was

drafted to apply in “many very different legal systems”).

\*5 The federal courts, being courts of limited jurisdiction, cannot properly hear a case without the consent of Congress. Therefore, Congress granted the federal courts jurisdiction over actions or proceedings falling under the Convention. See Pub.L. No. 91–368, 84 Stat. 692, 692–93 (July 31, 1970), codified at 9 U.S.C. §§ 203, 205. The Convention itself must be interpreted in light of its implementing legislation. See 9 U.S.C. § 201. Further, elsewhere the necessity of jurisdiction before an agreement may be enforced is mentioned. In 9 U.S.C. § 206, Congress specified that “a court having jurisdiction under this chapter” can direct arbitration as provided in the agreement. Pub.L. No. 91–368, 84 Stat. 693, codified at 9 U.S.C. § 206. The mention of “a court having jurisdiction” makes plain that jurisdiction is a necessary precondition to enforcement.<sup>5</sup>

The mandatory nature of the Convention’s text further disallows Plaintiffs’ preferred reading. See *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir.1974) (concluding that “[t]here is nothing discretionary about article II(3) of the Convention.”). Article II(3) provides that a “court ... seized of an action ... shall ... refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” Convention art. II(3), 21 U.S.T. 2517 (emphasis added). Under our law, only a court with jurisdiction has the power to refer the parties to arbitration (or indeed to issue any orders in the case). Because a court “seized of an action” under article II(3) is required to refer the parties to arbitration, it follows that a federal court “seized of” an action under that provision must have jurisdiction. Reading the Convention to require a court without jurisdiction to refer parties to arbitration would lead to an absurd result.

As implemented, article II(3) must be read such that in the absence of jurisdiction the district court would not be “seized of” the action. It is therefore appropriate to determine whether federal jurisdiction exists before turning to the question whether there is an allowable defense to enforcement; only a court “seized of” a suit related to an arbitration clause covered by the Convention can turn to the question whether the arbitration clause shall be enforced, and only a court with jurisdiction may be seized of the suit. Only once jurisdiction is determined is the court to turn to the enforceability of the arbitration agreement, a question which requires it to consider whether the agreement is “null and void, inoperative or incapable of being performed.” Convention art. II(3), 21 U.S.T. 2517; see also *Jain v. de Mere*, 51 F.3d 686, 691 (7th Cir.1995) (“Given that the court is properly seized of

this action, it should not then be left helpless to enforce the arbitration agreement.”); Restatement (Third) of Foreign Rel. L. of the U.S. § 487 cmt. e (1987) (explaining that “a court having jurisdiction of an action concerning a controversy with respect to which an agreement to arbitrate is in effect (i) must, at the request of any party, stay or dismiss the action, pending arbitration; and (ii) may direct the parties to proceed to arbitration in accordance with the agreement”).

#### ***A. Does the Arbitration Agreement Fall Under the Convention?***

\*6 Removal under Section 205 is predicated on the relatedness of the subject matter of the suit to an arbitration agreement “fall[ing] under the Convention.” 9 U.S.C. § 205. Whether an arbitration agreement “fall[s] under the Convention” is governed by 9 U.S.C. § 202 and the Convention itself. The federal courts have developed a four-factor inquiry used to determine whether the requirements of Section 202 and the Convention are satisfied. The court must determine (1) whether “there is an agreement in writing within the meaning of the Convention;” (2) whether “the agreement provides for arbitration in the territory of a signatory of the Convention;” (3) whether “the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial;” and (4) whether “a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.” *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 654–55 (9th Cir.2009) (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n. 7 (11th Cir.2005)). If all four questions are answered in the affirmative, the arbitration agreement “falls under [the Convention].” *Standard Bent Glass*, 333 F.3d at 448–49.

Other courts, including those relied upon by the Ninth Circuit in *Balen*, have specified that these four factors are jurisdictional and therefore only after they are satisfied is the court to consider the substantive enforceability of the agreement. See *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 366–67 (4th Cir.2012); *Bautista*, 396 F.3d at 1294–95;<sup>6</sup> *Standard Bent Glass*, 333 F.3d at 448–49; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir.1982). The Fourth Circuit explains that “[w]hen these jurisdictional prerequisites have been satisfied, a district court is obliged to order arbitration ‘unless it finds that the [arbitration] agreement is null and void, inoperative or incapable of being performed.’” *Aggarao*, 675 F.3d at 366 (alteration in original) (quoting the Convention Art. II(3), 21 U.S.T. 2517.<sup>7</sup>

The Ninth Circuit applied these factors in *Balen*, 583 F.3d

at 654–55. Although in *Balen* the Ninth Circuit stated that courts “address” these factors “to determine whether to enforce an arbitration agreement under the Convention,” *id.* at 654, the cases on which it relied actually applied the factors to the jurisdictional question whether the agreement is covered by the Convention, not the substantive enforceability of the arbitration agreement, *see Bautista*, 396 F.3d at 1294–95; *Standard Bent Glass*, 333 F.3d at 448–49. For this reason and the textual reasons discussed above, I decline to interpret the Ninth Circuit’s description of the factors’ purpose as other than jurisdictional.

Furthermore, the Ninth Circuit’s reasoning is consistent with its sister circuits’ framing of the two (separate) inquiries. The *Balen* court applied the factors in a portion of its opinion dealing with whether the Convention applied to the arbitration agreement at issue, not whether it was subject to contract defenses.<sup>8</sup> 583 F.3d at 654–55. I therefore conclude that the four factors applied in *Balen* pertain to the jurisdictional inquiry.

<sup>7</sup> The first factor is whether “there is an agreement in writing within the meaning of the Convention.” *Balen*, 583 F.3d at 654–55 (quoting *Bautista*, 396 F.3d at 1294 n. 7). I find that there is an agreement in writing within the meaning of the Convention, *i.e.* the Macgrecov Agreement’s arbitration clause.<sup>9</sup>

The final three factors are whether “the agreement provides for arbitration in the territory of a signatory of the Convention;” whether “the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial;” and whether “a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.” *Balen*, 583 F.3d at 654–55 (quoting *Bautista*, 396 F.3d at 1294 n. 7). These factors are easily disposed of; indeed, Plaintiffs do not contest that they are satisfied. The agreement provides for arbitration in the territory of a signatory of the Convention, *i.e.*, Cyprus. the agreement arises out of a commercial relationship; and there are parties to the agreement, *i.e.*, the foreign entity Defendants and Mr. van der Staal, who are not American citizens. *See Balen*, 583 F.3d at 654–55.

Therefore, I find that the Macgrecov Agreement’s arbitration clause “fall[s] under the Convention” as required by Section 205.

### ***B. Is the Subject Matter of the Action “Related to” the Arbitration Agreement?***

Once the court has determined that the agreement falls under the Convention, the inquiry into removal jurisdiction under Section 205 is quite limited. Removal is proper if the “subject matter of [the] action or proceeding pending in State court *relates to* an arbitration agreement or award falling under the Convention.” 9 U.S.C. § 205 (emphasis added). “[W]henver an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit.” *Infutura*, 631 F.3d at 1137–38 (quoting *Beiser*, 284 F.3d at 669) (emphasis in original). In *Beiser*, the Fifth Circuit observed that “[w]hatever else the phrase ‘relates to’ conveys, it means at least as much as having a possible effect on the outcome of an issue or decision.” 284 F.3d at 669. The Ninth Circuit agreed, observing that “[t]he phrase ‘relates to’ is plainly broad.” *Infutura*, 631 F.3d at 1138.

That the jurisdictional inquiry is separate from the ultimate enforceability of the arbitration clause is emphasized in *Beiser*. The *Beiser* court made clear that a foreign arbitration agreement could conceivably affect a plaintiff’s suit even if the plaintiff “cannot ultimately be forced into arbitration .” *Beiser*, 284 F.3d at 669. It is therefore clear that a suit may be “relate[d] to an arbitration agreement ... falling under the Convention” even if arbitration cannot ultimately be required. *Id.*; 9 U.S.C. § 205.

<sup>8</sup> The Macgrecov Agreement’s arbitration clause plainly relates to Mr. Davis and WMD’s suit, as the claims arise, at least in part, from ownership of equity in Macgrecov, a relationship governed by the Macgrecov Agreement. Because the agreement “falls under the Convention” and the subject matter of the suit “relates to” the agreement, the court has jurisdiction under 9 U.S.C. § 205.

### ***II. Enforcement of the Arbitration Clause***

Having determined that the arbitration agreement is covered by the Convention and that the subject matter of the suit is related to the FAA, I turn to Plaintiffs’ defenses to enforcement.<sup>10</sup> Article II(3) of the Convention requires the court to “refer the parties to arbitration” unless the agreement is “null and void, inoperative or incapable of being enforced.”

The enforceability of foreign arbitration clauses covered by the Convention is governed by substantive federal arbitration law. *See* 9 U.S.C. § 208. If a party seeking to avoid arbitration challenges the arbitration clause itself, the court is to decide the question of enforceability; if a challenge is to the contract as a whole, it is to be resolved by the arbitrator. *See Buckeye Check Cashing, Inc. v.*

*Cardegna*, 546 U.S. 440, 447–49 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). Thus, in general I am only to consider arguments that are specific to the arbitration provision itself, “separate and distinct from any challenge to the underlying contract.” *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1410 (9th Cir.1989) (emphasis omitted).

However, the Ninth Circuit has established that when a party resisting arbitration seeks to show that the contract containing the arbitration clause is void, as opposed to voidable, it is proper for the district court to resolve the question notwithstanding that it is an attack on the contract as a whole. In *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir.1991), the Ninth Circuit held that *Prima Paint’s* bar on such consideration is “limited to challenges seeking to avoid or rescind a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to.” 925 F.2d at 1140 (emphasis omitted). The Ninth Circuit reasoned that “a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate.” *Id.* at 1140–41; see also *Stanford v. Member Works, Inc.*, 483 F.3d 956, 963 (9th Cir.2007) (explaining *Three Valleys’s* relationship with the holding of *Prima Paint* ).

The *Prima Paint* rule applies to all but one of Plaintiffs’ arguments for unenforceability; the remaining argument is governed by the rule announced in *Three Valleys*.

#### A. Plaintiffs’ Fraud Defenses

Plaintiffs contend that “the Norwegian Investors induced Davis’s assent to the arbitration clause with both affirmative misrepresentation and misrepresentations by non-disclosure.” (Pl.’s Mem. [15] at 13.) Plaintiffs put forward two theories of fraud. First, they argue that Defendants falsely represented to Mr. Davis that the only differences between the Macgregov Agreement and the Balusa Agreement are that it “shifts the competent court to Cyprus, to ensure that the entire jurisdiction is offshore,” and changes the company name from Balusa to Macgregov. *Id.* (emphasis omitted). Plaintiffs contend that this misled them because it failed to mention that there was an *arbitration* clause under Cypriot law in the Macgregov Agreement. Second, Plaintiffs contend that Defendants changed the Macgregov Agreement’s terms after Mr. Davis (on behalf of WMD) had signed it. *Id.* at 23–24.

#### 1. Fraud in the Inducement Theory

\*9 Plaintiffs first theory is one of fraud in the inducement: Defendants misrepresented the terms of the Macgregov Agreement in order to coerce Mr. Davis to sign it. Because fraud in the inducement makes a contract voidable rather than void, I may consider this argument only if it pertains to the arbitration clause itself. See *Buckeye Check Cashing*, 546 U.S. at 447–49; *Prima Paint*, 388 U.S. at 403–04. Happily for Plaintiffs, it does: the alleged misrepresentations are related to the arbitration clause specifically, and so consideration of this argument by this Court is proper.

Plaintiffs argue that Mr. van der Staal affirmatively misrepresented the nature of the Macgregov Agreement’s dispute resolution clause when he told Mr. Davis that the Macgregov Agreement was “identical” to the Balusa Agreement except that it changed the company names and “shifts the competent court to [C]yprus.” (Pl.’s Mem. [15] at 13 (emphasis and alteration in original) (quoting Armstrong Decl. [17] Ex. 11 at 1).) It is Plaintiffs’ position that the reference to “court” misled Davis, because “court” does not include arbitration. *Id.* They argue that “the plain understanding of van der Staal’s statement that the arbitration clause shifted the jurisdiction to the competent court of Cyprus was that any dispute would be resolved by a judge or jury in Cyprus, not by arbitration.” *Id.* at 13–14. Finally, Plaintiffs argue that van der Staal owed fiduciary duties to Davis, a minority shareholder of Balusa, because he was an officer of Cascade Tanks and Balusa, and that he therefore had a duty to explain the Macgregov Agreement’s dispute resolution clause to Mr. Davis and failed to do so. *Id.* at 14.

Defendants respond that Plaintiffs’ theory does not satisfy several elements of fraud in the inducement. The elements of fraud in Oregon are as follows: (1) a representation; (2) that is false; (3) and is material; (4) the speaker’s knowledge of falsity or ignorance of truth; (5) the speaker’s intent that the representation be acted on “by the person and in the manner reasonably contemplated;” (6) the hearer’s ignorance of the statement’s falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely; and (9) the hearer’s injury caused thereby. *Conzelmann v. Northwest Poultry & Dairy Products Co.*, 190 Or. 332, 350, 225 P.2d 757, 764–765 (1950); see also Restatement (Second) of Contracts § 162 (1981). Defendants contend that Plaintiffs’ theory fails to show that the statements made by Mr. van der Staal were false, fails to show any intent to induce Mr. Davis to rely on the statements, fails to show that Plaintiffs actually relied on their misunderstanding of the Agreement in entering into it, and fails to show that the alleged reliance on Mr. van

der Staal's statements was reasonable.

As explained on the record, I agree that the allegedly fraudulent statements were not false. The Balusa Agreement, which Plaintiffs signed after consulting counsel, provides for binding arbitration in Nevada under the oversight of a Nevada court and is governed by Nevada law. The Macgrecov Agreement changed the dispute resolution provision so that the contract provided for arbitration in Cyprus under Cypriot law. That the competent court was changed from Nevada to Cyprus is simply not false. More importantly, the fact of binding arbitration remained constant between the two Agreements. Mr. van der Staal's description of the changes from the Balusa Agreement in the Macgrecov Agreement would not be expected to include the fact that arbitration was now required, as this was not a change.

\*10 Defendants next contend that Plaintiffs can only show fraud in the inducement by proving that Mr. Davis was induced to sign the Macgrecov Agreement in reliance on a statement that the Macgrecov provided for resolution of disputes in a *court* in Cyprus, not by arbitration in Cyprus. As I explained on the record, I find that this showing has not been made. Plaintiffs did not put forward evidence sufficient to show that Defendants intended Mr. Davis to rely on his misunderstanding of the Macgrecov Agreement's arbitration clause in signing it.<sup>11</sup>

Finally, Defendants argue that Mr. Davis could not reasonably rely on Mr. van der Staal's statements without reading the contract itself. (Def.'s Resp. [27] at 22.) As explained on the record, I agree with Defendants. A showing of fraud requires that the party claiming reliance show that it was reasonable for him to rely. *See Oregon PERK v. Simat, Helliessen & Eichner*, 191 Or.App. 408, 428, 83 P.3d 350, 362 (2004); Restatement (Second) of Contracts § 162(2)). Mr. Davis and WMD could not reasonably rely on the proffered understanding of Mr. van der Staal's statements because this understanding contradicted the plain terms of the Macgrecov Agreement. Had Mr. Davis even skimmed the contract, he would have seen that it provided for arbitration.

Moreover, I find that even if Defendants owe fiduciary duties to Plaintiffs, Defendants breached no duty to explain the meaning of the Macgrecov Agreement to Mr. Davis and WMD. Mr. Davis represented that he was consulting counsel about the Macgrecov Agreement as he had done with the Balusa Agreement, and he was given ample time to consider its terms. Defendants and their officers could reasonably believe that he would do so and that he signed the agreement with full understanding.

## 2. Fraud in the Factum Theory

Plaintiffs also argues that Mr. Davis never signed the final version of the Macgrecov Agreement: "[t]he document that defendants hold out as an enforceable arbitration agreement is the result of continued editing and discussions amongst the Norwegian Investors after the time that Davis[ ] purportedly signed the agreement." (Pl.'s Mem. [15] at 15.) As explained on the record, I read this argument as fraud in fact because it challenges whether Mr. Davis ever signed the document purported to be the Macgrecov Agreement at all.

Because this argument challenged the very existence of the Macgrecov Agreement, it is proper under Ninth Circuit precedent to address it, notwithstanding that it is not specific to the arbitration clause. *See Three Valleys*, 925 F.2d at 1140 (holding that the court may address challenges going to "the very existence of a contract that a party claims never to have agreed to").

Here, Plaintiffs' contention is that Mr. Davis never signed the final Macgrecov Agreement. For the reasons stated on the record, I find that Plaintiffs have failed to make a showing sufficient to show such fraud. There is no evidence that what Mr. Davis signed was, in actuality, different than the contract submitted by the parties in this Court. Moreover, Plaintiffs themselves submitted the Macgrecov Agreement along with their complaint, alleging that it is the one signed by Mr. Davis on behalf of WMD. (Not. of Removal [1–1] Ex. B.) Plaintiffs' own reliance on the existence of the Macgrecov Agreement, in combination with their failure of proof regarding whether the Agreement was changed after Mr. Davis signed the signature pages, belies their argument that the Macgrecov Agreement was never signed.

## B. Plaintiffs' Waiver Defense

\*11 Under federal arbitration law, waiver is found where the party seeking to enforce an arbitration clause is shown to have been aware of an "existing right to compel arbitration," took actions inconsistent with that right, and thereby caused prejudice to the party opposing arbitration. *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 720–21 (9th Cir.2012) (citing *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir.1986)). "[A]ny party arguing waiver of arbitration bears a heavy burden of proof." *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir.1988) (internal quotation omitted). Although participation in litigation can result in a finding of waiver, *c.f. Hoffman Constr. Co. of Or. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798–99 (9th Cir.1992), the

necessary showing of prejudice is unlikely to be satisfied where litigation has not progressed beyond the pleading stages, *United Computer Sys.*, 298 F.3d at 765.

Plaintiffs argue that Defendants have waived their right to compel arbitration by litigating jurisdiction in state court before removal and by bringing a separate action in Nevada that involves Mr. Davis's employment contract.<sup>12</sup> Rather than "promptly moving to compel arbitration," Plaintiffs argue, Defendants did not seek arbitration until "after they lost an important discovery motion." (Pl's Mem. [15] at 34.) Defendants point out that the "important discovery motion" pertained to jurisdictional discovery regarding the foreign Defendants' challenge to the court's personal jurisdiction. (Def.'s Resp. [27] at 31.) They argue that they cannot be considered to have acted inconsistently with their right to compel arbitration simply by contesting personal jurisdiction, the lack of which they have a right to raise. As explained on the record, I agree with Defendants. I hold that a party does not act inconsistently with its right to compel arbitration of claims brought against it by contesting whether it may be haled into court in the first place, even if relatively extensive litigation of the jurisdictional issue is required as a result.<sup>13</sup> See *United Computer Sys.*, 298 F.3d at 765.

I also find that the foreign entities who seek to invoke the arbitration clause in the Macgrecov Agreement cannot be said to have waived their right to arbitration based on the Nevada litigation that is taking place between many of the same parties. Plaintiffs have made no factual showing that the foreign Defendants have participated in the Nevada claims (which arise from Mr. Davis's employment agreement, not ownership of the companies). That counterclaims exist in that case that are parallel to those at issue here does not result in waiver: Plaintiffs here brought those counterclaims, and Plaintiffs' actions cannot be used to show waiver by any defendant. Thus, I find that the foreign Defendants have not waived their right to compel arbitration under the Macgrecov Agreement by acting inconsistently with that right in the Nevada action. They simply have not participated in that action at all.

### C. Plaintiffs' Unconscionability Defense

\*12 Finally, Plaintiffs urged this Court to find the Macgrecov Agreement's arbitration clause unenforceable by reason of unconscionability. Defendants argue that unconscionability, while available as a defense under the domestic FAA, is not available under the Convention; and that even if the defense is available, the dispute resolution clause is not unconscionable.

### 1. Availability of Unconscionability as a Defense to Enforcement

The Convention's defenses to enforcement are limited to arguments that the foreign arbitration clause is "null and void, inoperative or incapable of being performed." Convention Art. II(3), 21 U.S.T. 2517. In contrast, the domestic FAA allows a party to contest arbitration "on such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Defendants contend that unconscionability, while available as a defense to enforcement under the broad provision of the FAA, is simply not included in the Convention's narrow list of defenses.

Although the Ninth Circuit has not addressed the scope of the Convention's defenses, other courts have done so. Other courts have concluded that the Convention's "null and void" clause allows only such defense as "can be applied neutrally on an international scale." *Ledee*, 684 F.2d at 187 (internal citation omitted). In *Ledee*, the court reasoned as follows:

The parochial interests of ... [a] state[ ] cannot be the measure of how the "null and void" clause is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not even the parochial interests of the nation may be the measure of interpretation.

*Id.* (internal quotation omitted). Fraud, mistake, duress, and waiver have been recognized as properly applicable under the Convention.<sup>14</sup> *Id.*

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court recognized that the Convention does not directly parallel the FAA. At issue was whether a foreign arbitration agreement could be enforced so as to require arbitration of antitrust claims brought under the Sherman Act. 473 U.S. at 620–24. The Court rejected lower courts' conclusion that "the pervasive public interest in enforcement of the antitrust laws" justified nonenforcement of an otherwise applicable foreign arbitration agreement. *Id.* at 629 (internal quotation omitted). "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes," the Court concluded, "require that we enforce the parties' agreement, even assuming that a contrary

result would be forthcoming in a domestic context.” *Id.* Enforcement of foreign arbitration agreements under the Convention does not directly parallel enforcement of domestic arbitration agreements under the FAA.<sup>15</sup>

\*13 The Fifth Circuit has concluded that “state-law principles of unconscionability” are not defenses to enforcement under the Convention, reasoning that the Convention allows only such defenses as can be applied in all signatory countries under a “precise, universal definition.” *Bautista*, 396 F.3d at 1302. The Ninth Circuit has not had occasion to decide whether unconscionability is available. In *Rogers*, 547 F.3d at 1158, the court assumed without deciding that unconscionability was available as a defense, but concluded that unconscionability had not been shown.

Unconscionability is an inherently equitable defense implicating the fine details of state public policy. As the Supreme Court has recognized, “the principal purpose underlying American adoption and implementation of [the Convention] was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” *Scherk v. Alberto-Culber Co.*, 417 U.S. 506, 520 n. 15 (1974); see also *Born*, *supra* n .2, at 105–07. An unconscionability defense is a poor fit for the Convention’s policy of unified standards for the enforcement of arbitration agreements and awards. To subject agreements to defenses that turn on the particular public policy of the signatory nation (or state) would create harmful uncertainty for parties seeking to use arbitration agreements to facilitate international transactions. See *Mitsubishi*, 473 U.S. at 620–24; *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8–9 (1972) (“The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms”).

Were it necessary to determine whether unconscionability is available as a defense to enforcement of an arbitration agreement under the Convention, I would conclude that it is not. Like the *Rogers* court, however, I need not decide whether unconscionability is available as a defense to enforcement of a foreign arbitration agreement covered by the Convention. Even if that defense is available, the Macgregor Agreement’s arbitration clause is not barred thereby.

## 2. Unconscionability Arguments

Under Oregon law, the test for unconscionability “has both procedural and substantive components,” but the party asserting unconscionability need not show procedural unconscionability if the contract is shown to be substantively unconscionable. See *Hatkoff v. Portland Adventist Med. Center*, 252 Or.App. 210, 217–18, 287 P.3d 1113, 1118 (2012) (internal quotation omitted); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or.App. 553, 567, 152 P.3d 940, 948 (2007) (observing that “only substantive unconscionability is absolutely necessary”). The doctrine of unconscionability has been explained as follows:

\*14 Procedural unconscionability refers to the conditions of contract formation and involves a focus on two factors: oppression and surprise. Oppression exists when there is inequality in bargaining power between the parties, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice. Surprise involves the question whether the allegedly unconscionable terms were hidden from the party seeking to avoid them.

“Substantive unconscionability” generally refers to the terms of the contract, rather than the circumstances of formation, and the inquiry focuses on whether the substantive terms unfairly favor the party with greater bargaining power.

*Livingston v. Metro. Pediatrics, LLC*, 234 Or.App. 137, 151, 227 P.3d 796, 806 (2010). The Restatement (Second) of Contracts explains unconscionability in similar terms: “Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy.” Restatement (Second) of Contracts § 208 cmt. a. Plaintiffs argue that the Macgregor Agreement’s arbitration clause is both procedurally and substantively unconscionable.

First, it is worth explaining that this is not a case involving a consumer transaction or contract of employment. jr. [69] at 54:25–55:24.) Plaintiffs argue that this case is “more analogous to cases involving employment relationships than sophisticated business dealings” because Mr. Davis “was foremost an employee who was presented with an agreement by his employer to obtain a substantial portion of his compensation.” (Pl.’s Reply [48] at 15.) They rely heavily on *Twilleager v. RDO Vermeer, LLC*, No. 10–1167, 2011 WL 1637469

(D.Or. Apr. 1, 2011), in which the court found an arbitration agreement unconscionable where it required an employee service technician to travel from Oregon to North Dakota to arbitrate disability discrimination and Family and Medical Leave Act claims. 2011 WL 1637469 at \*9. Although I have taken into account that equity in Defendant Cascade Tanks was part of Mr. Davis's employment compensation, Mr. Davis is not similarly situated to the service technician in *Twilleager*, and neither are the claims at issue in this case similar to the federal statutory rights at issue in that case. I consider cases involving wage and hour employees to be largely inapplicable here. Furthermore, arbitration agreements between employer and employee are considered conscionable where the employee is given ample time to review the agreement and has the education to understand it. *See Livingston*, 234 Or.App. at 152, 227 P.3d at 806 (contract between doctor and medical group was not a contract of adhesion where doctor, "who is highly educated, had an opportunity to review the employment agreement for two weeks, and he signed and returned it without making any changes"). Here, although Defendants do not contest that Mr. Davis is not as highly educated as the plaintiff in *Livingston*, it is apparent that he has sufficient business sophistication to run the on-the-ground operations of a large company, and, more importantly, had access to counsel and months in which to review the agreement.<sup>16</sup>

\*15 Although it is uncontested that the shares in Macgrecov were intended to be part of Mr. Davis's compensation, he also failed to show that the Macgrecov Agreement, with both its upsides and its downsides, was not bargained for. The unconscionability inquiry looks to the terms of the contract at the time it was signed, not the parties' positions once a conflict has arisen later. *See W.L. May Co., Inc. v. Philco-Ford Corp.*, 273 Or. 701, 707-08, 543 P.2d 283, 287 (1975). Taking one's compensation in the form of equity has the potential for significant benefits as well as increased risks, of which Mr. Davis was surely aware at the time of contract formation. Mr. Davis has not shown that he was unaware of these risks and benefits.

Finally, the claims at issue in Plaintiffs' case against these Defendants arise from WMD's status as a shareholder in Defendant entities and from Mr. Davis's ownership of WMD. Plaintiff WMD is the entity that owns shares in Macgrecov, and WMD cannot be said to be an employee of any Defendant. Although Mr. Davis was an employee of Defendant Cascade Tanks, he signed the Macgrecov Agreement in his capacity as owner of WMD, not in his capacity as an employee.

#### a) Procedural Unconscionability

Plaintiffs argue that the Agreement is procedurally unconscionable because "[t]he Norwegian Investors used pressure and deception to obtain Davis's assent to the Macgrecov Agreement." (Pl.'s Mem. [15] at 20.) As explained above, I found that Plaintiff had shown no such pressure and deception. For the reasons stated on the record and above, I find that there was nothing procedurally unconscionable about Plaintiffs' assent to the Macgrecov Agreement's arbitration clause. Mr. Davis had several months' time in which to review the agreement before he signed it, and had the opportunity to consult with counsel. He had consulted with counsel before signing the Balusa agreement, which provided for arbitration of any disputes in Nevada. Evidence submitted by the parties shows that Mr. Davis was also given the opportunity to negotiate the terms of the Macgrecov Agreement. *See Armstrong Decl.* [17] Ex. 11 at 1-3. For instance, in an email dated February 9, 2012, Mr. van der Staal specifically mentioned changing a certain term of the Macgrecov Agreement if Mr. Davis's lawyer was concerned about the meaning of the term as then drafted. *Id.* at 3.

The record shows that Mr. Davis and WMD had the "opportunity to negotiate the terms of the contract." *Hatkoff*, 252 Or.App. at 217, 287 P.3d at 1118 (internal quotation omitted). Mr. Davis's own decision not to carefully review the Macgrecov Agreement or to consult with counsel before signing it does not create procedural unconscionability; that a party with bargaining power fails to exercise that power does not create unconscionability in contract formation. Plaintiffs have also failed to show any surprise. The plain text of the Macgrecov Agreement provided for arbitration in Cyprus, and as Defendants point out, Mr. van der Staal's statements about the similarities between it and the Balusa Agreement should have drawn Mr. Davis's attention to the dispute resolution provision, rather than hiding it.

#### b) Substantive Unconscionability

\*16 However, an arbitration clause may be unenforceable in Oregon even in the absence of procedural unconscionable if it is substantively unconscionable. *Vasquez-Lopez*, 210 Or.App. at 566-67, 152 P.3d at 948. "[I]n determining whether the substantive contract provisions of a commercial contract are unconscionable," Oregon courts "look to the circumstances existing at the time of the execution of the contract and examine the challenged provisions in the light of both the general commercial background and the special commercial needs of the particular trade involved." *W.L. May*, 273 Or. at 708-09, 543 P.2d at 287; *see also Vasquez-Lopez*, 210

Or.App. at 556, 152 P.3d at 948 (“unconscionability is a question of law to be assessed on the basis of facts in existence at the time the contract was made”).

Substantive unconscionability in Oregon is recognized where the terms of the arbitration agreement unreasonably favor the party with greater bargaining power. *Hatkoff*, 252 Or.App. at 217, 287 P.3d at 1118. Even assuming Defendants had greater bargaining power than did Plaintiffs, the terms of the agreement do not unreasonably favor them. Naturally, there are some costs to arbitration that would not exist if the dispute were litigated, such as fees for the arbitrator and for facilities. Because the Macgrecov Agreement governs the relationship between several parties of various countries of citizenship and residence, there is no venue that would be convenient to all parties.<sup>17</sup> The parties therefore could reasonably agree to arbitration in Cyprus, which is none of the individuals’ home country but is the country of citizenship of Macgrecov, the parent company.

Although in the Macgrecov Agreement the site changed from Nevada to Cyprus, this change did not increase the anticipated costs of arbitration per se. Rather, it added potential international travel costs and substituted the need for counsel familiar with Nevada law for counsel familiar with Cypriot law. These potential costs, however, came with the tax benefits of offshore incorporation, of which Mr. Davis was surely aware. In exchange for the future tax benefits of holding the companies offshore, he reasonably took the risk that, in the event of a dispute, arbitration could involve international travel.

### III. Stay and Severability

Plaintiffs urged me to sever their claims against the domestic entity Defendants and allow them to proceed in state court even if I were to enforce the arbitration agreement as to the foreign Defendants. I declined to do so, ordering that all claims be stayed for the pendency of the arbitration. As pled, Plaintiffs’ claims against the various defendants are indistinguishable from one another. Therefore, parallel state court litigation would seriously interfere with the arbitration for which the parties to the Macgrecov Agreement contracted. See *Moses H. Cone*, 460 U.S. at 20–21. As I explained in my Order, the parties are free to avoid duplicative litigation by agreement to a global arbitration of all claims, including those against Defendants who are not signatories to the Macgrecov Agreement.

### CONCLUSION

\*17 For the reasons explained above, the Motion to Remand is DENIED and the Motion for Stay Pending Arbitration is GRANTED. All claims are STAYED pending arbitration under the terms of the Macgrecov agreement.

IT IS SO ORDERED.

#### Footnotes

- 1 In this sentence, “seized” is used in a past participial phrase modifying “court.”
- 2 Gary B. Born, *I International Commercial Arbitration* 116 (2d ed.2014) (internal quotation omitted).
- 3 See Albert van den Berg, *The New York Arbitration Convention of 1958* 123 (1981) (“The uniform provisions [of the Convention] supersede the relevant provisions of municipal [local] law”); *c.f. Rogers*, 547 F.3d at 1157–58 (applying Article II(3)’s “null and void” defense, not set out in Chapter 2 of Title 9, United States Code, instead of the FAA’s broader defenses provision); *Bautista*, 396 F.3d at 1301–02 (same); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir.2003) (applying Article II(2)’s requirement that the agreement be in writing).
- 4 See van den Berg, *supra* n. 3, at 123 (observing that the Convention “contains internationally uniform provisions, but it also leaves a number of matters to be determined under some municipal law”).
- 5 The term “seized of” has been used in other contexts to describe that a court has jurisdiction. See *Rosado v. Wyman*, 397 U.S. 397, 403 (1970) (using the term “seised of jurisdiction” to describe a district court’s exercise of federal question jurisdiction); *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 694 (1950) (discussing whether a court sitting in admiralty is “seized of jurisdiction to correct a fraud”); *F.C.C. v. Assoc. Broadcasters*, 311 U.S. 132, 135 (1940) (considering whether the court below was “seized of jurisdiction”); *Hallstrom v. Tillamook Cnty.*, 844 F.2d 598, 601 (9th Cir.1987) (noting that the federal courts’ pendant jurisdiction over state law claims can exist only “if the court has previously properly been seized of jurisdiction”)

(internal quotation omitted).

6 Plaintiff cites a case from the Southern District of Florida, *Ruiz v. Carnival Corp.*, 754 F.Supp.2d 1328, 1330–31 (S.D.Fla.2010), for the proposition that whether the agreement is “null and void” is part of the jurisdictional inquiry. In that case, the court cited *Bautista*, 396 F.3d at 1295 n. 7, for the proposition that “[e]ven if these jurisdictional requirements are met, *removal* is improper if affirmative defenses such as ‘fraud, mistake, duress, and waiver’ render the arbitration agreement ‘null and void.’ “ 754 F.Supp.2d at 1330 (emphasis added). I read *Bautista* differently. In *Bautista*, the Eleventh Circuit explained that “[a] district court must order arbitration unless (1) the four jurisdictional prerequisites are not met, ... or (2) one of the Convention’s affirmative defenses applies.” 396 F.3d at 1294–95. This makes clear that the court inquired separately into jurisdiction and enforcement. The *Bautista* court concluded that in that case “there [were] no impediments to the district court’s jurisdiction to compel arbitration,” and “[f]urthermore,” that “the agreement to arbitrate [was] not null and void or incapable of being performed.” *Id.* at 1303. Thus, to the extent the *Ruiz* court’s reasoning conflated the two inquiries I reject it as inconsistent with *Bautista*.

7 In *Aggarao*, jurisdiction was not predicated on the propriety of removal under Section 205, so the court did not need to address whether the subject matter of the suit was “related to” an agreement covered by the Convention. *See* 675 F.3d at 361.

8 The Ninth Circuit addressed the plaintiff’s arguments for the unenforceability of the arbitration agreement separately, concluding that each was unavailing. *See* 583 F.3d at 653–54. The *Balen* court was faced with jurisdictional arguments, but they were based on the domestic Federal Arbitration Act’s provision exempting “contracts of employment of seamen,” not the scope of 9 U.S.C. §§ 203 or 205. *Id.* at 652–53. The court simply held that this exemption was not applicable to arbitration clauses covered by the Convention. *Id.* (citing *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1154 (9th Cir.2008)). The FAA’s exemption clause therefore did not affect whether the court had jurisdiction under Title 9, Chapter 2.

9 In practicality the inquiry into whether the proffered arbitration clause falls under the Convention may occasionally implicate issues also relevant to the enforceability of the arbitration clause. Although I view the better approach to be to reserve full such consideration for the enforceability stage, I have taken into account whether any of Plaintiffs’ arguments against enforcement could also impact jurisdiction at this stage. (*See* Tr. [69] 49:3–21.) This inquiry need not reach the full substance of the arguments regarding enforceability. Only a prima facie showing of each factor pertinent to whether the arbitration agreement “fall[s] under the Convention” is required. 9 U.S.C. § 205.

In this case, Plaintiffs argue that Mr. Davis, on behalf of WMD, never actually signed the final version of the Macgrecov Agreement containing the arbitration clause. As I explained on the record, this is essentially an argument that there was no meeting of the minds, and thus the contract containing the arbitration clause does not exist. This is why I took into consideration whether Plaintiffs’ argument that the Macgrecov Agreement was not final when Mr. Davis signed it. For the reasons stated on the record, I found that Plaintiffs had failed to show any such fraud. (Tr. [69] at 50:6–51:6.) Plaintiffs did not rebut Defendants’ showing that an arbitration agreement in writing exists within the meaning of the Convention. *See Balen*, 583 F.3d at 654.

10 Defendants Macgrecov and Tritoria asked that I stay judicial proceedings pending arbitration under the terms of the Macgrecov Agreement. Although they argued that interpretation of the Macgrecov Agreement is to be done under Cypriot law under the terms of the Agreement, they provided no citations to or argument on the law of Cyprus. (Resp. [27] at 17.) I therefore found that they had waived the application of Cypriot law, and have applied the law of Oregon to interpretation of the contract and Plaintiffs’ defenses to enforcement.

11 Plaintiffs’ contention is that Defendants pressured Mr. Davis into signing the agreement quickly in order to effectuate the transfer of ownership to Macgrecov. First, I find this factual showing insufficient. In light of Mr. Davis’s admission that he had the agreement for several months before signing it and that Mr. van der Staal actually mentioned Mr. Davis’s consulting with counsel, *see* Armstrong Decl. [17] Ex. 11 at 3, I find that Mr. Davis simply was not pressured into signing the agreement without reading it or fully understanding it. Even if there were such a showing, however, I would find it irrelevant because it shows only inducement to sign the Macgrecov Agreement as a whole, not inducement to sign the arbitration clause specifically. Whether the contract as a whole was induced by fraud is a question for the arbitrator.

12 This action is pending as Case No. 13–689221 in the District Court for Clark County, Nevada.

13 The same might not be true if the argument for a lack of personal jurisdiction were groundless or frivolous. That is not the case here, and I need not decide whether a contest to personal jurisdiction that is without basis in law or fact could result in waiver. It is enough to observe that a supportable contest to the court’s personal jurisdiction, such as the foreign Defendants raised in the state court, does not result in waiver.

14 As I noted on the record, “null and void” could be read to encompass only defenses showing that the contract is void, and not merely voidable. (Tr. [69] at 53:22–54:14) However, the provision has long been held to include defenses rendering the agreement merely voidable, such as fraud in the inducement, waiver, and duress. Therefore, this narrow reading would be inconsistent with

precedent.

- 15 It has been recognized that the “null and void” inquiry, relevant to the agreement-enforcement stage, is separate from any public policy defense that might be raised at the award-enforcement stage. *See Aggarao*, 675 F.3d at 372–73; *see also* Restatement (Third) of Foreign Rel. L. of the U.S. § 488(2)(b) & reporter’s note 2. In *Mitsubishi*, the Court recognized that at the award-enforcement stage the court would consider whether enforcement of the arbitration award would be “contrary to the public policy” of the United States. 473 U.S. at 637–38.
- 16 Plaintiffs make much of the fact that Mr. Davis’s formal education continued only to the eighth grade. While this fact is not irrelevant, it does not negate that Mr. Davis has developed significant expertise in the relevant industry and was apparently a highly valued management-level employee of Cascade Tanks. Most importantly, because he had access to counsel and time to consult, any detriment caused by his lack of formal education could and should have been ameliorated.
- 17 Although this fact is primarily relevant to procedural unconscionability, I also note that Plaintiffs’ own purported understanding of the Macgrecov Agreement would still require them to travel to Cyprus to litigate any disputes. It is difficult to see how the existence of the costs of international travel would have been a great burden to Mr. Davis at the time the agreement was signed, in light of Plaintiffs’ concession that he understood at the time that dispute resolution under the Macgrecov Agreement would be overseas.



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Not for Publication in West's Federal Reporter See  
Fed. Rule of Appellate Procedure 32.1 generally  
governing citation of judicial decisions issued on or  
after Jan. 1, 2007. See also Ninth Circuit Rule 36-3.

(Find CTA9 Rule 36-3)

United States Court of Appeals,  
Ninth Circuit.

ELITE LOGISTICS CORPORATION, and on  
behalf of all others similarly situated,  
Plaintiff–Appellee,

v.

HANJIN SHIPPING CO., LTD.,  
Defendant–Appellant.

No. 12–56238. | Argued and Submitted April 10,  
2014. | Filed Sept. 19, 2014.

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Appeal from the United States District Court for the  
Central District of California, Dean D. Pregerson, District  
Judge, Presiding. D.C. No. 2:11–cv–02961–DDP–PLA.

Before THOMAS, M. SMITH, JR., and CHRISTEN,  
Circuit Judges.

#### MEMORANDUM\*

\*1 Hanjin Shipping Co. (“Hanjin”) appeals the district  
court’s order denying Hanjin’s motion to compel  
arbitration. We affirm. Because the parties are familiar  
with the history of this case, we need not recount it here.

#### I

Following submission of this appeal, the district court  
entered an order resolving certain claims. We requested  
the parties to brief the question of whether or not the

district court order rendered this appeal moot. Both  
parties agree that it did not and, after reviewing their  
submissions we conclude that the appeal is justiciable.

#### II

The district court did not err in holding that the arbitration  
agreement was unconscionable under California law and,  
therefore, that the motion to compel arbitration should be  
denied.<sup>1</sup> In California, a contract clause is unconscionable  
if both procedurally and substantively unconscionable.  
*See Armendariz v. Found. Health Psychcare Servs., Inc.*,  
6 P.3d 669, 689–90 (Cal.2000) (articulating “general  
principles” of unconscionability). California law utilizes a  
sliding scale to determine the ultimate question of  
unconscionability—greater substantive unconscionability  
may compensate for lesser procedural unconscionability.  
*Id.* at 690. In California, “the core concern of  
unconscionability doctrine is the ‘absence of meaningful  
choice on the part of one of the parties together with  
contract terms which are unreasonably favorable to the  
other party.’ “ *Sonic–Calabasas A, Inc. v. Moreno*, 311  
P.3d 184, 202 (Cal.2013) (quoting *Williams v.*  
*Walker–Thomas Furniture Co.*, 350 F.2d 445, 449  
(D.C.Cir.1965)).

#### A

The district court did not err in concluding that the  
arbitration agreement was procedurally unconscionable  
under California law. Whether an arbitration agreement is  
procedurally unconscionable depends on “ ‘the manner in  
which the contract was negotiated and the circumstances  
of the parties at that time.’ “ *Ingle v. Circuit City Stores,*  
*Inc.*, 328 F.3d 1165, 1171 (9th Cir.2003) (quoting *Kinney*  
*v. United HealthCare Servs., Inc.*, 83 Cal.Rptr.2d 348,  
352–53 (Cal.App.1999)). Procedural unconscionability  
generally takes the form of a contract of adhesion, in  
which a contract drafted by the party of superior  
bargaining strength is imposed on the other without the  
opportunity to negotiate the terms. *Shroyer v. New*  
*Cingular Wireless Servs., Inc.*, 498 F.3d 976, 982 (9th  
Cir.2007). Here, the record supports the district court’s  
conclusion that Elite Logistics Corp. (“Elite”) did not take  
part in any contract negotiations and had no choice but to  
sign the agreement if it wished to conduct business as an  
intermodal carrier. Without a meaningful opportunity for  
Elite to negotiate, and with Elite faced with a “take it or

leave it” proposition, the district court did not err in concluding that the contract was procedurally unconscionable under California law. See *Pokorny v. Quixtar*, 601 F.3d 987, 994 (9th Cir.2010) (explaining federal courts apply state-law principles to determine the validity of arbitration agreement).<sup>2</sup>

## B

\*2 The district court also did not err in concluding that the arbitration provision was substantively unreasonable. Under California law, “[s]ubstantive unconscionability focuses on the one-sidedness or overly harsh effect of the contract term or clause.” *Harper v. Ultimo*, 7 Cal.Rptr.3d 418, 423 (Cal.App.2003). “Substantive unconscionability addresses the fairness of the term in dispute.” *Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862, 867 (Cal.App.2002). Mutuality is the “paramount” consideration when assessing substantive unconscionability. *Abramson v. Juniper Networks, Inc.*, 9 Cal.Rptr.3d 422, 436 (Cal.App.2004). “Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability.” *Id.* at 437 (internal quotes and citation omitted).

Here, the district court properly concluded that the contract was substantively unconscionable under California law. Under the agreement, the invoiced party must provide written notice of its dispute as to an invoice within 30 days, which is shorter than California’s four-year statute of limitations. The burden to dispute an invoice is on the invoiced party. After receiving the dispute response from the invoicing party, the invoiced party has 15 days to pay the invoice or seek arbitration. If an invoiced party proceeds to arbitration, it must submit all of its arguments to the arbitration panel first. Further, the arbitration panel lacks the authority to enjoin wrongful conduct, which is a significant burden in cases such as the one at bar where recurring invoice problems are at issue.

## C

The district court did not fail to apply the principles of the Federal Arbitration Act, as claimed by Hanjin. “The Federal Arbitration Act (‘FAA’), 9 U.S.C. §§ 1, *et seq.*, reflects a ‘liberal federal policy’ in favor of arbitration.” *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1092 (9th Cir.2014) (quoting *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011)). Pursuant to the Supremacy

Clause of the United States Constitution, “the FAA preempts contrary state law.” *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1158 (9th Cir.2013). However, the FAA does not preempt California’s procedural unconscionability rules. *Chavarria v. Ralphs Grocery, Co.*, 733 F.3d 916, 926 (9th Cir.2013); see also *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal.2013) (confirming that “state courts may continue to enforce unconscionability rules that do not ‘interfere[ ] with fundamental attributes of arbitration’”) (quoting *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011)). Although the FAA may preempt state laws having a “disproportionate impact” on arbitration, it “cannot be read to immunize all arbitration agreements from invalidation.” *Chavarria*, 733 F.3d at 927. Insofar as an application of state substantive unconscionability rules do not discriminate unfavorably against arbitration, they do not offend the FAA. *Id.*

\*3 Here, the district court appropriately considered the FAA’s policy and preemptive reach in concluding that the arbitration agreement was unconscionable under California law.

## III

In sum, the appeal is not moot. The district court properly concluded that the arbitration agreement was unconscionable under California law and, therefore, properly denied the motion to compel arbitration. We need not, and do not, reach any other question urged by the parties on appeal.

**AFFIRMED.**

M. SMITH, Circuit Judge, dissenting:

\*3 I respectfully dissent. In holding that the district court correctly voided the arbitration clause as unconscionable under California law, the majority relies on *Pokorny v. Quixtar*, 601 F.3d 987 (9th Cir.2010), *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir.2007), *Abramson v. Juniper Networks, Inc.*, 9 Cal.Rptr.3d 422 (Cal.App.2004), *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir.2003), *Harper v. Ultimo*, 7 Cal.Rptr.3d 418 (Cal.App.2003), *Szetela v. Discover Bank*, 118 Cal.Rptr.2d 862 (Cal.App.2002), and *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal.2000).

In so doing, the majority fails to acknowledge that in *AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1747 (2011), the Supreme Court held that the Federal Arbitration Act preempts certain state law contract defenses that have a disproportionate effect on arbitration clauses. The Supreme Court also clarified that an arbitration clause is not procedurally unconscionable merely because it appears in a contract of adhesion. *Id.* at 1750–53.

Following *Concepcion*, the California Supreme Court expressly reconsidered how its unconscionability jurisprudence applies to arbitration agreements. *Sonic-Calabasas A. Inc. v. Moreno*, 311 P.3d 184, 1140–49 (Cal.2013).<sup>1</sup> In *Sonic-Calabasas*, the California Supreme Court explained that in order to hold that an arbitration clause is void under California law, we must engage in a *fact-intensive* inquiry as to both procedural and substantive unconscionability. *See id.* at 204–05. When considering procedural unconscionability, we must find that the arbitration provision was the result of “oppression or surprise due to unequal bargaining power.” *Id.* at 194. When considering substantive unconscionability, we must find that the provision “is unreasonably favorable to one party, considering in context ‘its commercial setting, purpose, and effect.’” *Id.* at 205 (internal citation omitted).

Under *Sonic-Calabasas*, the party asserting that an arbitration clause is void bears the burden of proving that the clause is unenforceable. *Id.* Moreover, the Supreme Court of California emphasized that under California law discovery is generally necessary to assess whether an arbitration clause is unconscionable:

[California Civil Code] section 1670.5, subdivision (b) provides that “[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable *the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court*

*in making the determination,”* and we have said, in construing [the California Civil Code], that “a claim of unconscionability often cannot be determined merely by examining the face of the contract.” *Perdue v. Crocker Nat’l Bank*, 702 P.2d 503, 512 (Cal.1985).

\*4 *Id.* at 204 (emphasis added).

In my view, the district court did not have enough facts before it to engage in the analysis that the California Supreme Court requires. The district court did not permit the parties to engage in factual discovery before voiding the arbitration clause. Rather, the court resolved Hanjin’s motion based solely on the pleadings and a bare-bones affidavit. And in so doing, the court erroneously resolved all disputed facts in Hanjin’s favor. *See Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir.2008) (a motion to compel arbitration is the “functional equivalent” of a motion for summary judgment); *see also Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 774–76 (3d Cir.2013).

Because the district court did not permit factual discovery before ruling on the motion to compel arbitration, the factual record is not adequately developed, and I cannot locate within it those facts that are necessary to determine: (1) whether the arbitration provision was the result of “oppression or surprise due to unequal bargaining power;” or (2) whether the provision “is unreasonably favorable to one party, considering in context ‘its commercial setting, purpose, and effect.’” *Sonic-Calabasas*, 311 P.3d at 194, 205 (internal citation omitted). For this reason, I believe that a remand is required to develop a factual record that would permit the district court to engage in this analysis in the first instance.<sup>2</sup>

I respectfully dissent.

#### Footnotes

- \* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.
- <sup>1</sup> The parties agree that there are no material factual disputes; however, they disagree as to the legal significance of the undisputed facts.
- <sup>2</sup> The dissent argues that under *AT & T Mobility L.L. C. v. Concepcion*, 131 S.Ct. 1740 (2011), an arbitration clause may not be found procedurally unconscionable because it appears in a contract of adhesion. However, this characterization strips the Court’s language of its contextual framework. In *Concepcion*, the Court concluded that arbitration clauses contained in some adhesion contracts—namely, those contained in adhesive consumer contracts—may still be valid. *Id.* at 1750. However, the Court did not hold that that arbitration clauses may *never* be found procedurally unconscionable merely because they appear in a contract of adhesion. Indeed, we have held that *Concepcion* did not fundamentally alter the legal landscape of procedural unconscionability.

*Coneff v. AT & T*, 673 F.3d 1155, 1161 (9th Cir.2012) (procedural unconscionability is “an inquiry for which *Concepcion* gives little guidance beyond a recognition of the doctrine’s continued vitality”).

- 1 The majority also cites to *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir.2013) for the proposition that the FAA does not preempt California’s “unconscionability rules,” but this case does not discuss the manner in which the California Supreme Court changed its unconscionability jurisprudence in light of *Concepcion*. Indeed, it was issued two months prior to *Sonic-Calabasas*.
- 2 In reaching this conclusion, I acknowledge that the district court issued its opinion prior to *Sonic-Calabasas*’ publication. Nevertheless, “[t]he general rule ... is that an appellate court must apply the law in effect at the time it renders its decision.” *Clabourne v. Ryan*, 745 F.3d 362, 380 (9th Cir.2014) (internal quotation marks and citations omitted).

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2014 WL 1379645

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.  
San Francisco Division

Norma Marquez, Plaintiff,  
v.  
Brookdale Senior Living, Defendants.

No. 13-cv-05320-RS | Signed 04/08/2014

#### Attorneys and Law Firms

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### ORDER GRANTING MOTION TO COMPEL ARBITRATION AND DENYING SANCTIONS

RICHARD SEEBORG, UNITED STATES DISTRICT JUDGE

#### I. INTRODUCTION

\*1 Plaintiff Norma Marquez brings this action against defendant Brookdale Senior Living (“Brookdale”) alleging employment discrimination based on her sexual orientation, disability, and medical condition. She also alleges Brookdale retaliated against her by wrongfully terminating her. Brookdale moves to compel arbitration, invoking an agreement to arbitrate that Marquez signed as a condition of her employment. Brookdale also seeks sanctions against Marquez and her counsel, alleging they filed a frivolous lawsuit and acted in bad faith. Marquez opposes the motion, contending the agreement is unenforceable. For the following reasons Brookdale’s motion to compel arbitration will be granted and this action will be stayed pending arbitration. Brookdale’s request for sanctions will be denied.

#### II. BACKGROUND

Brookdale hired Marquez as a caregiver in May of 2011. Marquez was required to sign Brookdale’s Employment Arbitration Agreement (the “agreement”) as a condition of her employment. The agreement states that Brookdale and Marquez agree to arbitrate any disputes arising between the parties during the course of her employment with Brookdale. In early 2013, Brookdale informed Marquez that they had received a “hotline” tip that she was engaging in inappropriate workplace behavior with a female subordinate. Based on this conversation and the fact that she reportedly injured her back while taking care of a patient, Marquez contends she was terminated two months later for “false reasons.” Marquez subsequently filed a complaint in Superior Court alleging Brookdale discriminatorily terminated her because of her back injury, resulting medical condition, and sexual orientation. Brookdale filed a response, denying Marquez’s claims and questioning the extent and manner of her injuries. Brookdale also asserted a number of affirmative defenses, including its right to arbitrate Marquez’s claims. Brookdale removed the action to this court, invoking diversity jurisdiction under 28 U.S.C. § 1441. Brookdale seeks to enforce its right to arbitrate Marquez’s claim in this motion to compel arbitration.

#### III. DISCUSSION

##### A. Enforceability of the Agreement

To resolve whether a dispute is subject to arbitration, the court first determines whether the parties agreed to arbitrate and, if they did, whether the agreement covers the dispute at issue. *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir.1996). “[A]n agreement to arbitrate is a matter of contract: ‘it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.’ ” *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). Brookdale’s records show that Marquez signed the agreement. (Declaration of Nananne Eichermueller ¶ 3, Ex. A). Marquez does not dispute this fact. This provides a sufficient basis to conclude that the parties entered into a valid agreement to arbitrate.

The parties do not contest the agreement covers the dispute at issue. The agreement specifies, “[a]ny controversy or claim arising out of or relating to your

employment relationship with us or the termination of that relationship, must be submitted for final and binding resolution by a private and impartial arbitrator.” As such, the agreement covers Marquez’s claims.

\*2 Pursuant to Civil Local Rule 7–3(a) Marquez was required to file an opposition to Brookdale’s motion to compel arbitration. Marquez failed to do so, instead petitioning the court to accept her untimely opposition. Brookdale argues that this failure should result in granting the motion to compel arbitration, dismissing the case, and awarding it attorney fees. “The failure to file any required paper, or the failure to file it within the deadline, may be deemed consent to the granting or denial of the motion.” L.R. 7–12. Although Brookdale is correct that failure to file a timely opposition could result in the court granting the motion on this basis alone, in the interests of resolving the motion on the merits, the parties’ claims are addressed as follows.

#### a. Waiver of Right to Arbitration

Marquez argues Brookdale waived its right to enforce the agreement by delaying filing a motion to compel arbitration. Brookdale contends that no such waiver occurred. There are six factors a court takes into consideration when determining whether a party has relinquished its right to arbitrate: (1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether litigation preparation has substantially begun; (3) whether a party requested arbitration enforcement close to trial or delayed for a significant period of time before seeking enforcement; (4) whether the party filed a counterclaim without seeking a stay of the proceedings; (5) whether “important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place;” and (6) whether the delay “affected, misled, or prejudiced” the opposing party. *St. Agnes Medical Center v. PacificCare of California*, 31 Cal.4th 1187, 1196 (2003). “The moving party’s mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party’s delay in seeking arbitration.” *Davis v. Continental Airlines, Inc.*, 59 Cal.App. 4th 205, 212 (1997).

In support of its motion, Brookdale attaches e-mails and letters that it sent to Marquez requesting to arbitrate her claims. These support Brookdale’s contention that it has acted consistently in its attempts to enforce its right to arbitrate under the agreement. While Marquez claims she was generally prejudiced by the five months Brookdale waited to file this motion, she fails to specify how this prejudice has caused her harm. She does not allege that

she has engaged in substantial litigation preparation, provided discovery, or otherwise revealed her litigation strategy.

The cases Marquez cites in support of her contention that a timing delay is sufficient in itself to create prejudice are distinguishable.<sup>1</sup> Many of the motions arose when plaintiffs moved to compel arbitration. That scenario is distinctly different from this case because Brookdale is responding to Marquez’s lawsuit, not filing a lawsuit against Marquez and then attempting to pursue arbitration after a lengthy delay and the pursuit of discovery. Marquez fails to establish that she suffered prejudice sufficient to warrant a finding that Brookdale waived its right to arbitrate.

#### B. Unconscionability of the Agreement

\*3 As an employment arbitration policy, the agreement is subject to the Federal Arbitration Act (“FAA”). *Circuit City Stores v. Adams*, 532 U.S. 105 (2001). Federal policy encourages arbitration, prohibiting state courts from treating arbitration agreements differently than any other contractual agreement. *AT & T Mobility v. Concepcion*, 131 S.Ct. 1740, 1747 (2011); *Gilmer v. Inter-state/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). Under the FAA, arbitration agreements “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 (2012). As a result, courts cannot nullify arbitration agreements based either on state law that applies only to arbitration agreements or a general public policy against arbitration. *Concepcion*, 131 S.Ct. at 1747. The court must apply a contractual defense, like unconscionability, in the same way it would to any contract dispute. *Id.* at 1748. Accordingly, review of the agreement must be in the context of the FAA’s mandate to encourage arbitration coupled with consideration of Marquez’s unconscionability claim under California contract law. *Id.* at 1745; *Ackerberg v. Citicorp USA, Inc.*, 898 F.Supp.2d 1172, 1175 (N.D.Cal.2012).

Under California law, a contractual clause is unenforceable only if it is both procedurally and substantively unconscionable. See *Armendariz v. Found Health Psychcare Servs., Inc.*, 24 Cal.4th 83 (2000); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir.2006). “The 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.” *Armendariz*, 24 Cal.4th at 114. Still, “both [must] be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of

unconscionability.” *Id.*

**a. Procedural Unconscionability**

Procedural unconscionability arises from circumstances surrounding the formation and negotiation of a contract. *Armendariz*, 24 Cal.4th at 113. It focuses on two elements: oppression and surprise. *Id.* “Oppression” occurs where one party has little or no ability to negotiate the terms of the contract, resulting in an unequal bargaining position and lack of meaningful choice. *Id.* “Surprise” looks to the extent to which the terms of the contract were hidden by the party in the stronger bargaining position. *Id.*

Marquez argues that Brookdale’s “take it or leave it” imposition of the agreement as a condition of employment makes the agreement oppressive, while Brookdale contends that such employment conditions are not *per se* unconscionable. “Take it or leave it” agreements are “standardized contract [s], which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Id.* (quoting *Neal v. State Farm Ins. Cos.*, 188 Cal.App.2d 690 (1961)). Here, Marquez had no bargaining power, a fact which weighs in favor of finding the contract procedurally unconscionable.

**b. Substantive Unconscionability**

An arbitration provision is substantively unconscionable if it is “overly harsh” or generates “one-sided results,” typically looking to “whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner.” *Serpa*, 215 Cal.App. 4th at 703, as modified (Apr. 19, 2013) (quoting *Armendariz*, 24 Cal. 4th at 114). “[T]he paramount consideration in assessing conscionability is mutuality.” *Abramson v. Juniper Networks, Inc.*, 115 Cal.App. 4th 638, 657 (2004). California law requires an arbitration agreement to have a “modicum of bilaterality”— focusing on whether a provision is so one-sided as to shock the conscience. *Armendariz*, 24 Cal.4th at 117; see also *Nyulassy v. Lockheed Martin Corp.*, 120 Cal.App. 4th 1267, 1281 (2004). Marquez argues several provisions of the agreement are substantively unconscionable.

**i. Injunctive Relief Provision**

\*4 Marquez argues that the agreement is one-sided, and

thus substantively unconscionable, because although it allows both parties to obtain injunctive relief from the courts, as a practical matter, only Brookdale will take advantage of this clause. The relevant provision provides that both parties may obtain injunctive relief from the courts and includes, but is not limited to, claims of unfair competition and disclosure of trade secrets claims. Brookdale argues the injunctive relief provision applies equally to both parties.

Although there are numerous potential injunctive relief claims that Marquez could bring under the FEHA and Title VII, the Court of Appeal has held that injunctive relief clauses typically present a high degree of substantive unconscionability. See *Trivedi v. Curexo Technology Corporation*, 189 Cal.App. 4th 387 (2010); *Fitz v. NCR Corp.* 118 Cal.App. 4th 702 (2004); *Mercurio v. Superior Court*, 96 Cal.App. 4th 167 (2002). Injunctive relief clauses, which may appear bilateral on their face, have the practical effect of being invoked only, or far more often, by the employer.<sup>2</sup> *Trivedi*, 189 Cal.App. 4th at 387. Accordingly, this injunctive relief provision weighs in favor of a finding of substantive unconscionability.

**ii. Costs of Arbitration**

To be substantively unconscionable, a fee provision must be one-sided such that it reallocates funds in an objectively unfair manner. *Serpa*, 215 Cal.App. 4th at 703; *Armendariz*, 24 Cal.4th at 111. Additionally, “when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *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; see e.g., *Howard v. Octagon*, 2013 U.S. Dist. LEXIS 131366 (N.D.Cal. Sept. 12, 2013) ( an arbitration agreement provision that requires the losing party to pay the legal fees associated with arbitration is substantively unconscionable); *Lou v. MA Labs Inc.* 2013 U.S. Dist. LEXIS 70665 (N.D.Cal. May 17, 2013) (holding a fee shifting provision that could be applied by discretion of the arbitrator substantially unconscionable).

Marquez contests the enforceability the agreements’ fee provision, which could potentially force her to bear fully the costs of arbitration. The agreement states:

The parties agree that the costs of the AAA administrative fees and the arbitrator’s fees and expenses

will be paid for us initially, but as provided by statute or decision of the arbitrator. In other words, all costs could after all is complete be paid by us or you, depending on the outcome. All other costs and expenses associated with the arbitration, including, without limitation, the party's respective attorneys' fees, shall be borne by the party incurring the expense, unless provided otherwise by statute or decision of the arbitrator.

\*5 The provision indicates that Brookdale will bear all initial costs of arbitration but if Marquez is unsuccessful in her claims or a statute otherwise provides for it, the costs may be shifted to her. The risk that she may have to bear excessive costs is sufficient to support a finding that the fee provision is also substantively unconscionable.

### C. Attorney Fees

Brookdale petitions for attorney fees in the amount of \$3,975 under Fed. R. Civ. P 11. Brookdale contends that Marquez and her attorney should be sanctioned for filing a frivolous complaint and acting in bad faith. Rule 11 allows a court to impose sanctions where an attorney files a lawsuit for an improper purpose or where the lawsuit is frivolous. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362. "The issue in determining whether to impose sanctions under Rule 11 is whether a reasonable attorney, having conducted an objectively reasonable inquiry into the facts and law, would have concluded that the offending paper was well-founded." *Schutts v. Bently Nevada Corp.*, 966 F.Supp. 1549, 1562 (D.Nev 1997). A court may also impose sanctions where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991).

Civil L.R. 7-8 requires a motion for sanctions to be filed separately from any of the parties' additional motions. Brookdale's failure to file individually its motion for sanctions is grounds for denial on that basis alone. However, even if Brookdale re-filed its' motion and fixed this error, sanctions are not appropriate in this case. There is no indication that counsel for Marquez or Marquez herself acted in bad faith or unreasonably. Marquez is entitled to pursue judicial resolution of her claims to the extent the law allows.

## V. SEVERABILITY

Where a contract is both procedurally and substantively unconscionable the court must determine whether the unconscionable terms can be severed and the remaining agreement enforced. *Armendariz*, 24 Cal.4th at 121-22 ("If 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."). To make this determination, the court looks to whether the unconscionable terms are the "purpose" of the agreement. *Id.*

Where the terms are merely collateral to the agreement as a whole, they may be severed and the rest of the agreement remains enforceable. *Id.* In this case it is not appropriate to invalidate the entire agreement. Although the injunction and fee provisions are unconscionable, they can be severed and clearly are not the purpose of the agreement. Once these provisions are severed, the remaining degree of procedural unconscionability is too low to warrant invalidating the entire agreement. Accordingly, Marquez has failed to demonstrate that the agreement is so permeated with unconscionability that it is rendered completely unenforceable.

## V. CONCLUSION

The injunctive relief provision contained in section 1, paragraph b(v) is stricken from the agreement. The cost provision contained in section 1, paragraph j is likewise stricken. As modified, Marquez's claims are subject to arbitration under the agreement. This action is hereby stayed pending completion of such arbitration. The Clerk is directed to close the file for administrative purposes. It may be reopened for such additional proceedings as may be appropriate and necessary upon conclusion of the arbitration. If the matter is resolved by settlement, or in the event Marquez elects not to pursue arbitration, she shall promptly file a dismissal of this action.

\*6 IT IS SO ORDERED.

### Footnotes

- <sup>1</sup> See *Guess?, Inc. v. Superior Court*, 79 Cal.App. 4th 553 (2000) (denying defendant's motion to compel arbitration because defendant answered plaintiff's complaint but did not allege a right to arbitrate as an affirmative defense, instead participating in the discovery process for three months before filing a motion to compel arbitration); *Kancko Ford Design v. Citipark, Inc.*, 202 Cal.App.3d 1220 (1988)(upholding a denial of plaintiff's motion to compel arbitration because plaintiff did nothing to notify defendant that it intended to pursue arbitration); *Augusta v. Keehn & Associates*, 193 Cal.App. 4th 331, 338 (2011)(holding that plaintiff waived his right to arbitrate by delaying arbitration for six months while continuing to obtain discovery from defendant); *Adolph v. Costal Auto Sales, Inc.*, 184 Cal.App. 4th 1443, 1446 (2010) (“[a] defendant may not use court proceedings for its own purposes, while remaining uncooperative with a plaintiff's court proceedings, and then, upon failing to achieve defendant's own objectives in court, and at the time when the parties should be engaged in final trial preparation, demand arbitration for the first time.”); *Lewis v. Fletcher Jones Motor Cars, Inc.*, 205 Cal.App. 4th 436, 442 (2012) (holding defendant waived the right to compel arbitration by seeking multiple merits rulings from the court ).
- <sup>2</sup> In two recent cases the California Court of Appeal declined to follow *Trivedi* 's reasoning. See *Baltazar v. Forever 21, Inc.*, 150 Cal.Rptr.3d 845, 858 (Cal.Ct.App.2012),*review granted and opinion superseded sub nom. Baltazar v. Forever 21*, 296 P.3d 974 (Cal.2013); *Leos v. Darden Restaurants, Inc.*, 158 Cal.Rptr.3d 384, 400 (Ct.App.2013)*review granted and opinion superseded sub nom. Leos v. Darden Restaurants*, 307 P.3d 878 (Cal.2013). The California Supreme Court has granted review of both *Baltazar* and *Leos*, effectively stripping each case of its precedential value. Unless and until California courts establish otherwise, *Trivedi* remains good law.

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2014 WL 6477636

Only the Westlaw citation is currently available.  
United States District Court, D. Colorado.

Rhonda Nesbitt, individually, and on behalf of all  
others similarly situated, Plaintiff,

v.

FCNH, Inc., Virginia Massage Therapy, Inc.,  
Mid-Atlantic Massage Therapy, Inc., Steiner  
Education Group, Inc., Steiner Leisure Ltd., SEG  
Cort LLC, d/b/a as the "Steiner Education Group",  
Defendants.

Civil Action No 14-cv-00990-RBJ | Filed  
November 19, 2014

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#### ORDER

R. Brooke Jackson, United States District Judge

\*1 This matter is before the Court on the defendants' Motion to Compel Arbitration of Individual Claims and to Stay Proceedings [ECF No. 10]. For the following reasons, the motion is denied.

#### BACKGROUND

The plaintiff, Ms. Nesbitt, filed this action with the Court on April 7, 2014. In her Complaint she alleges violations of the Fair Labor Standards Act ("FLSA") and numerous state wage and hour laws. According to the Complaint, the defendants are each involved in the management or operation of, or have an ownership interest in, the Steiner Education Group; and the Steiner Education Group runs schools of massage therapy and esthetics in Arizona, Colorado, Connecticut, Florida, Maryland, Massachusetts,

Illinois, Nevada, New Jersey, Pennsylvania, Texas, Utah, Virginia, and Washington. Ms. Nesbitt claims that while enrolled as students of massage therapy at one of these schools, she and the putative class members were required to perform massages for paying members of the general public without compensation. She alleges that the labor provided by herself and the putative class members established an employment relationship for purposes of the FLSA and state labor laws.

In the Complaint, Ms. Nesbitt admits that she entered into an arbitration agreement at the time of enrollment. The Arbitration Agreement provides that

[y]ou, the student, and Steiner Education Group ("SEG") agree that any dispute or claim between you and SEG (or any company affiliated with SEG or any of its or SEG's officers, directors, employees or agents) arising out of or relating to (1) this Enrollment Agreement, or the Student's recruitment, enrollment or attendance at SEG, (2) the education provided by SEG, (3) SEG's billing, financial aid, financing options, disbursement of funds or career service assistance, (4) the enforceability, existence, scope or validity of this Arbitration Agreement, or (5) any claim relating in any manner, to any act or omission regarding Student's relationship with SEG or SEG's employees, whether such dispute arises before, during or after Student's attendance at SEG, and whether the dispute is based on contract, statute, tort, or otherwise, shall be resolved through binding arbitration pursuant to this Section (the "Arbitration Agreement").

[ECF No. 1-1].

It continues,

Arbitration shall be conducted in accordance with the Commercial Rules of the American Arbitration Association applying federal law to the fullest extent possible, and the

substantive and procedural provisions of the Federal Arbitration Act (9 U.S.C. §§ 1–16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between the parties. Judgment upon the award rendered by the Arbitrator may be entered in any court having competent jurisdiction.

*Id.*

As to costs, the Arbitration Agreement provides that “[e]ach party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs.” *Id.*

\*2 The agreement then issues the following warning, in capital letters:

THIS ARBITRATION AGREEMENT LIMITS CERTAIN RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COURT ACTION, THE RIGHT TO A JURY TRIAL, THE RIGHT TO PARTICIPATE IN ANY FORM OF CLASS OR JOINT CLAIM, THE RIGHT TO ENGAGE IN DISCOVERY (EXCEPT AS PROVIDED IN THE APPLICABLE ARBITRATION RULES), AND THE RIGHT TO CERTAIN REMEDIES AND FORMS OF RELIEF. OTHER RIGHTS THAT YOU OR SEG WOULD HAVE IN COURT ALSO MAY NOT BE AVAILABLE IN ARBTRATION.

*Id.*

Finally, it ends with a “right to reject” provision, which states that the student

may reject this Arbitration Agreement by mailing a signed rejection notice to: Attention: Steiner Education Group Corporate Office, Compliance Department, 2001 W Sample Road, Ste. 318,

Pompano Beach, FL 33064 within 30 days after the date I sign this Enrollment Agreement. Any rejection notice must include my name, address, [and] telephone number.

*Id.*

The question for purposes of this motion is whether the Arbitration Agreement is enforceable against Ms. Nesbitt such that this Court must compel arbitration of her claims.

### LEGAL ANALYSIS

The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1–16, “embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Section 2 provides,

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... 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 (emphasis added). This provision reflects a “liberal federal policy favoring arbitration,” *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), as well as “the fundamental principle that arbitration is a matter of contract,” *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). “By its terms, the [FAA] leaves no place 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) (citing 9 U.S.C. §§ 3, 4) (emphasis in original). However, “[u]nlike the general presumption that a particular issue is arbitrable when the existence of an arbitration agreement is not in dispute, when the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away.” *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) (internal citations omitted).

**A. Is the Arbitration Agreement unconscionable?**

Section 2 of the FAA includes a saving clause that allows for arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “This saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ 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*, 131 S.Ct. 1740, 1746 (2011) (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Colorado’s test for unconscionability does not explicitly favor or disfavor arbitration. See *Bernal v. Burnett*, 793 F.Supp.2d 1280, 1287 (D. Colo. 2011).

\*3 The first question at issue in this case is whether the Arbitration Agreement is unenforceable because it is unconscionable. A federal court must apply state contract law principles when determining whether an arbitration agreement is valid and enforceable. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under Colorado law, one of the legal grounds for revoking a contract is unconscionability. See, e.g., *Davis v. M.L.G. Corp.*, 712 P.3d 985, 991 (Colo. 1986); *Univ. Hills Beauty Acad., Inc. v. Mountain States Tel. & Tel. Co.*, 554 P.2d 723, 726 (Colo. App. 1976). Colorado courts consider a number of factors in deciding whether a contractual provision is unconscionable, including:

- (1) the use of a standardized agreement executed by parties of unequal bargaining power;
- (2) the lack of an opportunity for the customer to read or become familiar with the document before signing it;
- (3) the use of fine print in the portion of the contract containing the provision in question;
- (4) the absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated;
- (5) the terms of the contract, including substantive fairness;
- (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and
- (7) the circumstances surrounding the formation of the contract, including setting, purpose, and effect.

*Bernal*, 793 F.Supp.2d at 1286 (citing *Davis*, 712 P.3d at 991) [hereinafter “the *Davis* factors”]. The *Davis* factors encompass both procedural and substantive unconscionability, both of which must be shown in Colorado. See *Vernon v. Qwest Commc’ns Intern., Inc.*, 925 F.Supp.2d 1185, 1194–95 (D. Colo. 2013); *Davis*, 712 P.2d at 991. The burden of proof is on the party opposing arbitration. See *Weller v. HSBC Mortg. Servs., Inc.*, 971 F.Supp.2d 1072, 1080 (D. Colo. 2013).

The plaintiff argues that most of the *Davis* factors weigh in her favor, and that taken together they show that the Arbitration Agreement is both substantively and procedurally unconscionable. The Court begins with an analysis of the alleged procedural unfairness of the agreement. The first, second, third, sixth, and seventh *Davis* factors relate to procedural unconscionability. Looking to the first factor, the Arbitration Agreement is a standardized agreement between parties with unequal bargaining power. However, this factor by itself is not enough for a finding of unconscionability. See *Concepcion*, 131 S.Ct. at 1750 (“[T]he times in which consumer contracts were anything other than adhesive are long past.”). The second factor looks to whether there was an opportunity to read and become familiar with the document before signing it. Ms. Nesbitt contends that she was not given an opportunity to become familiar with the document before signing it, alleging that she was presented with it at the time of enrollment and was required to sign all of her enrollment forms before being able to speak to a financial aid representative. She does not claim, however, that she was denied the opportunity to read the provision or that she was rushed through the process of enrolling. Moving along to the third factor, Ms. Nesbitt argues that the defendants used “fine print” in the portion of the enrollment forms containing the Arbitration Agreement. The Court notes that while the typeface does appear small, it is no smaller than the other enrollment provisions. See [ECF No. 1–1].<sup>1</sup> Ms. Nesbitt signed her initials next to these provisions, which were written in the same size font, and she has not claimed that she was unable to read them before signing them. Furthermore, the section of the Arbitration Agreement summarizing numerous waivers is written in capital letters, whereas none of the other enrollment provisions include capitalized sections.

\*4 The sixth factor requires analysis of the relationship between the parties, including issues of assent, notice, and unfair surprise. The biggest question at issue here is assent. The agreement provided a “right-to-reject” provision wherein Ms. Nesbitt could have opted out of the Arbitration Agreement within thirty days of enrolling. However, the assent factor also weighs in Ms. Nesbitt’s

favor, as the other sections of the enrollment form required her initials (showing affirmative assent), whereas only the Arbitration Agreement did not. Finally, the seventh factor is a catchall that allows for consideration of all of the factors surrounding formation of the contract. The plaintiff has presented no additional factors for consideration.

Taking into account all of the factors surrounding formation of the Arbitration Agreement, the Court finds that the agreement is not procedurally unconscionable. While the contract was certainly one of adhesion, Ms. Nesbitt was provided an opportunity to read the provision before signing it; notice of a variety of waivers was included in capitalized letters and in the same font size and typeface as the rest of the enrollment form sections; and Ms. Nesbitt was given the opportunity to opt out of the provision if she so chose. Furthermore, while she may not have had an opportunity to become familiar with the document on the date she signed it, she had thirty days to familiarize herself with its terms and opt out after enrolling. For these reasons, the Court finds that the provision is procedurally conscionable.

As discussed earlier, a contract provision is unenforceable only if both procedural and substantive unconscionability can be shown. Since the contract is procedurally conscionable, the Court need not address the substantive factors.

#### ***B. Do provisions of the Arbitration Agreement undermine federal statutory policy?***

The Supreme Court has recognized that arbitration is generally a sufficient medium for resolving federal statutory claims. See *Green Tree Fin. Corp.–Alabama v. Randolph*, 531 U.S. 79, 89 (2000). In fact, “even claims arising under a statute designed to further important social policies may be arbitrated.” *Id.* However, the presumption in favor of arbitration is not without its limits. See *Shankle v. B–G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999). Only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [will] the statute ... continue to serve both its remedial and deterrent function.” *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The presumption in favor of arbitration “falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.” *Shankle*, 163 F.3d at 1234 (collecting cases). “Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and

accessible alternative forum.” *Id.* (emphasis added). Furthermore, an arbitration provision may not operate “‘as a prospective waiver of a party’s right to pursue statutory remedies.’” *Am. Express Co. v. Italian Rest.*, 133 S.Ct. 2304, 2310 (2013) (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19) (emphasis omitted).

The second question at issue in this motion is whether the Arbitration Agreement is unenforceable because it would prevent Ms. Nesbitt and the putative class members from effectively vindicating their statutory rights under the FLSA.<sup>2</sup> Ms. Nesbitt argues that there are two provisions that undermine her statutory rights: the section directing that arbitration be conducted in accordance with the Commercial Rules of the American Arbitration Association and the provision providing that each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs. Notably, all that the plaintiff discusses with regard to the Commercial Rules appears to be the fees, costs, and expenses associated with arbitration under those rules as compared to the Employment Rules. Taking these two criticisms together, her argument is that the high cost of arbitration and the duty that each side bear its own expenses (particularly of counsel) render the Arbitration Agreement unenforceable. Furthermore, because the agreement does not contain a savings clause, it cannot be enforced in any capacity. The Court agrees.

\*5 In *Shankle*, the Tenth Circuit found an arbitration agreement unenforceable in the employment context because it placed the plaintiff “between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge’s services, and the prohibitive cost substantially limited use of the arbitral forum.” 163 F.3d at 1235. The court reasoned that the employer required the plaintiff “to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws.” *Id.* The defendants argue that this case does not concern an employment relationship, and that therefore the reservations in *Shankle* are not applicable here. That is a merits argument that the Court does not here address. See *supra* note 2. Assuming without deciding the existence of an employment relationship, and assuming for present purposes only that the defendants required the plaintiff to perform services on its behalf without compensation, the case implicates federal labor laws.

*Shankle* stands for the position that “an arbitration agreement requiring a plaintiff to share in the costs of

arbitration is unenforceable when the agreement effectively deprives the plaintiff of an accessible forum to resolve his statutory claim and vindicate his statutory rights.” *Daugherty v. Encana Oil & Gas (USA), Inc.*, No. 10–CV–02272–WJM–KLM, 2011 WL 2791338, at \*10 (D. Colo. July 15, 2011) (citing *Perez v. Hospitality Ventures–Denver LLC*, 245 F.Supp.2d 1172, 1173–74 (D. Colo. 2003); *Gourley v. Yellow Transp.*, 178 F.Supp.2d 1196, 1204 (D. Colo. 2001)). The plaintiff argues that under the Commercial Rules she will likely incur between \$2,320.50 and \$12,487.50 in costs simply paying for the arbitrator’s time, let alone the expenses associated with discovery, producing witnesses, the room rental, and other arbitration-related necessities. See Plaintiff’s Response [ECF No. 19] at 15. The Employment Rules, on the other hand, place virtually all of the arbitration costs on the employer (except for the \$200 filing fee) where the dispute arises out of an employer-promulgated plan (as opposed to an individually-negotiated employment contract). See American Arbitration Association, *Employment Arbitration Rules & Mediation Procedures* 32–34 (Rules Amended and Effective Nov. 1, 2009, Fee Schedule Amended and Effective Nov. 1, 2014), available at <http://www.adr.org/employment>.

Ms. Nesbitt has filed an affidavit establishing that she cannot afford the costs of proceeding under the Commercial Rules. [ECF No. 19–1]. The defendants’ only argument in response is that she might be eligible for a discounted rate based on a showing of financial hardship. Notably, application of the Employment Rules would save Ms. Nesbitt from the risk of bearing these costs should she be found not eligible for fee waivers. The Employment Rules do not require a showing of financial hardship, presumably to ensure that employees are not discouraged from vindicating their statutory rights. Since this is an (alleged) employment dispute, arguably the Employment Rules should apply. At a minimum, an arbitrator should be free to decide which rules apply based on his or her interpretation of the nature of the case. The Arbitration Agreement as written, however, would not permit such flexibility.

Ms. Nesbitt also points out that under the terms of the Arbitration Agreement she will be required to bear the costs of her own counsel. The FLSA, however, provides that where judgment is awarded to the plaintiff, the court shall “allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.” 29 U.S.C. § 216(b). This term therefore amounts to a prospective waiver of Ms. Nesbitt’s right to pursue a statutory remedy, specifically attorney’s fees. The defendants have made no argument in response.

The Court finds that these two provisions are unenforceable. First, the application of the Commercial Rules and their fee splitting provisions, along with the condition that Ms. Nesbitt bear the costs of producing experts, witnesses, and preparation and presentation of proofs, would effectively preclude Ms. Nesbitt from pursuing her claims.<sup>3</sup> See *Daugherty*, 2011 WL 2791338 at \*11 (citing *Shankle*, 163 F.3d at 1235). Second, requiring the plaintiff to bear the costs of her own counsel even should she prevail amounts to a prospective waiver of a statutory remedy while simultaneously undermining the enforcement scheme erected by the FLSA. The FLSA relies on individuals to bring claims as private attorneys general with the promise that should they prevail they will be awarded their reasonable attorney’s fees in addition to damages. See *id.*; *Gourley*, 178 F.Supp.2d at 1204. Eliminating this assurance may significantly chill individuals and attorneys from bringing these claims. As such, arbitration agreements denying a prevailing civil rights plaintiff the right to attorney’s fees are presumptively void as a matter of public policy. See *Gourley*, 178 F.Supp.2d at 1204.

\*6 The next question is whether the unenforceable provisions are severable such that the Arbitration Agreement can be saved. “A court is without authority to alter or amend contract terms and provisions absent an ambiguity in the contract.” *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 930 (10th Cir. 1992). “[W]here a contract contains a void arbitration provision, it must either be deemed unenforceable where there is no savings clause to the contract or, in keeping with the presumption in favor of arbitrability in the case of a contract with a savings clause, the void language may be stricken and the arbitration agreement otherwise enforced.” *Daugherty*, 2011 WL 2791338 at \*12. Because there is no savings clause and because the agreement itself is unambiguous its provisions cannot be stricken, rendering the entire Arbitration Agreement unenforceable. Compare *Fuller v. Pep Boys–Manny, Moe & Jack of Delaware, Inc.*, 88 F.Supp.2d 1158, 1162 (D. Colo. 2000) (striking fee-splitting provision and enforcing remainder of arbitration agreement where savings clause could be found) with *Gourley*, 178 F.Supp.2d at 1204 (refusing to enforce arbitration agreement with an unenforceable fee-splitting provision because the agreement did not contain severability or savings clause). The Court is without authority to alter or amend the agreement under these circumstances.

### **C. Does the Arbitration Agreement violate the NLRA?**

The plaintiff’s third and final argument is that the arbitration provision violates the National Labor Relations

Act (“NLRA”), 29 U.S.C. § 151 *et seq.*, in two distinct ways. The plaintiff voluntarily dismissed one of her arguments in support of this claim, *see* Plaintiff’s Notice of Supplemental Authorities [ECF No. 20], while maintaining the contention that the Arbitration Agreement is so broad that it would lead a reasonable person to believe that he or she was prevented from filing a charge before the National Labor Relations Board (“NLRB”). Because the Court has found the Arbitration Agreement unenforceable on other grounds, the question of whether it violates the NLRA is moot.

**ORDER**

For the foregoing reasons, the defendants’ Motion to Compel Arbitration of Individual Claims and to Stay Proceedings [ECF No. 10] is DENIED. The Court requests that counsel jointly contact Chambers within 14 days to reset the initial scheduling conference.

Footnotes

- <sup>1</sup> Though the parties reference a nine-page Enrollment Agreement, the Court has only been provided with the one page that contains the Arbitration Agreement. [ECF No. 1–1]. That said, it contains other provisions, specifically those entitled Crime Statistics, Photo Release, Field Trip Release, and Confidential Information. All of these provisions appear in the same typeface and font size.
- <sup>2</sup> To be clear, this Court is not deciding that the plaintiff had an employment relationship with SEG. That goes to the merits of the claim and is not a matter that the Court resolves at this stage. Similarly, the Court expresses no opinion at this stage as to whether, even if the Court were later to determine as a matter of law that an employment relationship existed, this case is appropriate for collective or class treatment.
- <sup>3</sup> In response to the defendant’s argument that Ms. Nesbitt hasn’t shown whether she would be eligible for reduced or waived arbitration fees, the Court still finds that the requirement that she bear these other arbitration-related costs would preclude her from being able to pursue her claim. Furthermore, should Ms. Nesbitt be able to afford the costs of arbitration, the attorney’s fee provision would still remain unenforceable.

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549 Fed.Appx. 692

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3.

(Find CTA9 Rule 36-3)

United States Court of Appeals,  
Ninth Circuit.

Heather NEWTON, individually and on behalf of others similarly situated, Plaintiff–Appellee,

v.

AMERICAN DEBT SERVICES, INC., a California corporation and Quality Support Services, LLC, a California limited liability company, Defendants,  
and

Global Client Solutions, LLC and Rocky Mountain Bank and Trust, Defendants–Appellants.

No. 12–15549. | Argued and Submitted Dec. 3, 2013.  
| Filed Dec. 12, 2013.

**Synopsis**

**Background:** Consumer brought putative class action against debt settlement company and bank, among others, alleging, inter alia, fraud, negligence, and interference with contractual relations. The United States District Court for the Northern District of California, Edward M. Chen, J., 854 F.Supp.2d 712, denied defendants’ motion to compel arbitration. Defendants appealed.

**Holdings:** The Court of Appeals held that:

[1] district court could decide arbitrability of dispute;

[2] arbitration agreement was procedurally unconscionable;

[3] arbitration agreement was substantively unconscionable; and

[4] district court did not implausibly or illogically decline to sever unconscionable parts of arbitration agreement.

Affirmed.

West Headnotes (4)

[1] **Alternative Dispute Resolution**

↪ Arbitrability of dispute

District court could decide arbitrability of dispute in consumer’s putative class action against debt settlement company and bank; parties did not assign issue of arbitrability to arbitrator, and crux of consumer’s complaint was not challenge to validity of entire contract, but instead alleged that company and bank charged illegal fees, provided negligent services, and made misrepresentations.

Cases that cite this headnote

[2] **Alternative Dispute Resolution**

↪ Unconscionability

Under California law, arbitration agreement was procedurally unconscionable, in that agreement was adhesion contract, and thus was oppressive, and surprise also was present, in that plaintiff did not sign arbitration agreement, which was incorporated by reference, agreement was on reverse side of one-page document, and agreement was in small print.

1 Cases that cite this headnote

[3] **Alternative Dispute Resolution**

↪ Unconscionability

Under California law, arbitration agreement was substantively unconscionable, in that it required consumer, who resided in California, to arbitrate in Oklahoma, agreement reserved selection of arbitrator solely to opposing parties, agreement limited damages otherwise available to consumer under statute, and agreement increased consumer’s potential liability for attorney fees as compared to California’s

codified fee shifting regime.

Cases that cite this headnote

<sup>14]</sup> **Alternative Dispute Resolution**  
↔ Unconscionability

District court did not implausibly or illogically decline to sever unconscionable parts of arbitration agreement, despite Congress's preference for arbitration, where, under California law, agreement included four unconscionable provisions and severing them all would have left a mere agreement to arbitrate, therefore requiring extensive reformation of agreement.

2 Cases that cite this headnote

**Attorneys and Law Firms**

\*693 Tavy Alice Dumont, Law Office of Tavy Alice Dumont, Campbell, CA, William E. Kennedy, Law Office of William E. Kennedy, Santa Clara, CA, F. Paul Bland, Jr., Public Justice, P.C., Washington, DC, Amy Radon, Public Justice, PC, Oakland, CA, for Plaintiff–Appellee.

Robert S. Boulter, Peter C. Lagarias, Lagarias & Boulter LLP, San Rafael, CA, Rebecca F. Bratter, Richard Wayne Epstein, Esquire, John H. Pelzerm, Greenspoon Marder PA, for Defendants–Appellants.

Appeal from the United States District Court for the Northern District of California, Edward M. Chen, District Judge, Presiding.

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

**MEMORANDUM**

Global Client Solutions and Rocky Mountain Bank & Trust (collectively Defendants) appeal from the district court's denial of their motion to compel arbitration in a purported class action brought by Heather Newton.

<sup>1]</sup> 1. We review a district court's decision on the arbitrability of a dispute de novo. *PowerAgent Inc. v.*

*Electronic Data Systems Corp.*, 358 F.3d 1187, 1191–92 (9th Cir.2004). The district court properly decided the arbitrability of this dispute, because (1) the parties did not assign the issue of arbitrability to the arbitrator and (2) the crux of Newton's complaint is not a challenge to the entire contract's validity. *Bridge Fund Capital v. Fastbucks Franchise*, 622 F.3d 996, 1000 (9th Cir.2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). Instead, Newton alleges in her complaint that Defendants charged illegal fees, provided negligent services, and made misrepresentations. Further, *Buckeye*'s "crux of the complaint" rule does not require the party opposing arbitration to have plead such opposition in its pleadings. *Bridge Fund*, 622 F.3d at 1001.

2. The Federal Arbitration Act establishes that contractual arbitration agreements must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. These grounds include "generally applicable contract defenses," *AT&T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011) (internal quotation marks omitted), like state law unconscionability, *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir.2002), if "agnostic towards arbitration," *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir.2013). In California, a contract clause is unconscionable if both procedurally and substantively unconscionable. *Armendariz v. Found.* \*694 *Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 689–90 (2000) (articulating "general principles" of unconscionability). We review a district court's denial of a motion to compel arbitration de novo, *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1057 (9th Cir.2013) (en banc), and its factual findings for clear error, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267–68 (9th Cir.2006) (en banc).

<sup>12]</sup> Whether an arbitration agreement is procedurally unconscionable depends on " 'the manner in which the contract was negotiated and the circumstances of the parties at that time.' " *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (9th Cir.2003) (quoting *Kinney v. United HealthCare Servs., Inc.*, 70 Cal.App.4th 1322, 83 Cal.Rptr.2d 348, 352–53 (1999)).<sup>1</sup> Elemental to this inquiry is whether the agreement "involves oppression or surprise." *Id.* Defendants concede the arbitration agreement was an adhesion contract. As a result, it is oppressive (and therefore procedurally unconscionable). *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal.App.4th 846, 113 Cal.Rptr.2d 376, 382 (2001). Surprise is also present, because (1) Newton did not sign the arbitration agreement (it was incorporated by reference); (2) the

arbitration agreement was on the reverse side of a one-page document; and the arbitration agreement was in small print. *Ingle*, 328 F.3d at 1171. Involving both oppression and surprise, the agreement is procedurally unconscionable.

<sup>131</sup> Contract provisions are substantively unconscionable if “unfairly one-sided.” *Little v. Auto Stiegler, Inc.*, 29 Cal.4th 1064, 130 Cal.Rptr.2d 892, 63 P.3d 979, 984 (2003). Four aspects of this arbitration agreement render it substantively unconscionable. First, the arbitration forum provision requires Newton, who resides in California, to arbitrate in Tulsa, Oklahoma—Global Client Solutions’s headquarters. *See Bolter v. Superior Court*, 87 Cal.App.4th 900, 104 Cal.Rptr.2d 888, 894 (2001) (finding substantive unconscionability when California litigants were required to arbitrate in Utah). Second, the arbitration agreement reserves the selection of an arbitrator solely to Defendants. *See Schulster Tunnels/Pre-Con v. Traylor Bros., Inc./Obayashi Corp.*, 111 Cal.App.4th 1328, 4 Cal.Rptr.3d 655, 666 (2003) (“A single arbitrator unilaterally selected by a contracting party adverse to the other party is presumed to be biased.”). Third, the arbitration agreement limits damages otherwise available to Newton under statute. *See Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 694 (“The unconscionable one-sidedness of the arbitration agreement is compounded ... by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer.”). Finally, the arbitration agreement increases Newton’s potential liability for attorney fees as compared to California’s codified fee shifting regime. *See Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir.2003) (“[P]arties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights.”). These four provisions demonstrate substantive unconscionability.<sup>2</sup>

\*695 In making this determination, we harmonize with *Concepcion*, because our decision is not founded on a policy “unfavorable to arbitration.” *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1160 (9th Cir.2013) (citing *Concepcion*, 131 S.Ct. at 1748). Instead, our inquiry is based on general California law respecting unconscionable contracts. *See Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 689; *Chavarria*, 733 F.3d at 927.

3. In California, severance is preferred over “voiding the entire agreement.” *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 696. The United States Supreme Court has an even stronger preference for severance in the context of arbitration agreements. *See Concepcion*, 131 S.Ct. at 1749 (recognizing “a liberal federal policy favoring arbitration” in the FAA). However, California law does not permit severing illegal provisions of an agreement if its “central purpose ... is tainted with illegality,” *Marathon Entm’t, Inc. v. Blasi*, 42 Cal.4th 974, 70 Cal.Rptr.3d 727, 174 P.3d 741, 754 (2008), and “a district court’s choice not to sever unconscionable portions of an arbitration agreement” is reviewed “for abuse of discretion,” *Bridge Fund*, 622 F.3d at 1000.

<sup>141</sup> The district court did not implausibly or illogically decline to sever the unconscionable parts of this arbitration agreement, *Forest Grove Sch. Dist. v. T.A.*, 638 F.3d 1234, 1238 (9th Cir.2011), despite Congress’s preference for arbitration. The arbitration agreement included four unconscionable provisions. To have severed all of them would have left a mere agreement to arbitrate, therefore requiring extensive reformation of the arbitration agreement. *Armendariz*, 99 Cal.Rptr.2d 745, 6 P.3d at 696–97.

The district court’s judgment is **AFFIRMED**.

#### Footnotes

- \* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.
- <sup>1</sup> “California’s procedural unconscionability rules do not disproportionately affect arbitration agreements, for they focus on the parties and the circumstances of the agreement and apply equally to the formation of all contracts.” *Chavarria*, 733 F.3d at 926.
- <sup>2</sup> That the damages limitation and fee shifting provisions were located outside of the specific arbitration clause does not mean those provisions cannot be considered when determining unconscionability of the arbitration agreement. *See Rent-A-Center, West Inc. v. Jackson*, 561 U.S. 63, 73, 130 S.Ct. 2772, 2780, 177 L.Ed.2d 403 (2010) (noting that provisions outside the specific arbitration clause may be considered in determining whether an arbitration agreement is unconscionable if those provisions “as applied” to the arbitration clause render it unconscionable).

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2014 WL 4655438  
Only the Westlaw citation is currently available.  
United States District Court,  
D. Arizona.

Joi N. STIRRUP, Plaintiff,  
v.  
EDUCATION MANAGEMENT LLC, et al.,  
Defendants.

No. CV-13-01063-TUC-CRP. | Signed Sept. 16,  
2014. | Filed Sept. 17, 2014.

### ORDER

CHARLES R. PYLE, United States Magistrate Judge.

\*1 The Magistrate Judge has jurisdiction over this matter pursuant to the parties' consent. *See* 28 U.S.C. § 636(c).

Pending before the Court are: (1) Defendants' Motion to Compel Arbitration and Stay These Proceedings Pending Arbitration (Doc. 10); (2) Plaintiff's Combined Response to Motion to Compel Arbitration and Stay These Proceedings and Motion for Partial Summary Judgment (Doc. 12); and (3) Plaintiff's Second Motion for Partial Summary Judgment and Supplemental Response to Defendants' Motion to Compel Arbitration (Doc. 23). The parties have also filed supplemental briefing regarding newly decided cases. (Docs. 25, 26, 31, 32). On August 11, 2014, the pending motions came on for oral argument. For the following reasons, the Court denies Defendants' Motion to Compel Arbitration and Stay These Proceedings Pending Arbitration and denies Plaintiff's Motions for Partial Summary Judgment.

#### BACKGROUND

Plaintiff Joi Stirrup alleges discrimination in the form of constructive discharge from her employment in violation of the False Claims Act, 31 U.S.C. § 3730(h), and wrongful termination in violation of A.R.S. § 23-1501(A)(3)(c)(i),(ii). (Complaint (Doc. 1), ¶ 6). Stirrup alleges that she had been employed by Defendants Education Management, LLC, and Education Management Corporation (collectively referred to as "EM") from December 2008 until the date of her constructive discharge in May 2013. (*Id.* at ¶¶ 1-5, 10).

At the time of her discharge, Stirrup was employed as the registrar at The Art Institute of Tucson ("AiTU"), which is owned and managed by EM. (*Id.* at ¶¶ 5, 11).

Stirrup alleges that while working at AiTU, she came to suspect that EM was not documenting or reporting the cancellations of newly enrolled students in order to keep: (1) tuition payments from lenders whose loans were insured by the U.S. government and/or (2) the students' Pell grant funds; and/or (3) benefits paid for the students by the Department of Veterans Affairs or the Arizona Department of Economic Security, "all ... of which EM was not entitled to receive or keep when a student timely exercised their right of cancellation." (*Id.* at ¶ 13). Stirrup further alleges that failure to report that a student withdrew, unlawfully increased the amount of federal and state funding EM received. (*Id.* at ¶ 15; *see also id.* at ¶¶ 18, 19 (citing two alleged instances of such conduct that Stirrup learned about in February 2013)). Stirrup also alleges that EM overstated "the schedules or case loads of some AiTU students in order to obtain more federally insured tuition money and federally funded Pell grants." (*Id.* at ¶ 17),

Stirrup alleges that she spoke to superiors about correcting records regarding the conduct described above. (*Id.* at ¶ 20). Stirrup alleges that her superiors denied wrongdoing and acted toward her with "hostility, which increased to the point where her working conditions became intolerable by May 14, 2013, and she was compelled to resign on that day." (*Id.*; *see also id.* at ¶ 21 (describing alleged retaliatory conduct)).

#### DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY THESE PROCEEDINGS PENDING ARBITRATION AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

\*2 EM seeks to compel arbitration of Stirrup's claims and to stay these proceedings pending arbitration. EM argues that in October 2012, Stirrup agreed, pursuant to EM's "Alternative Dispute Resolution Policy" ("ADR Policy"), to arbitrate claims of employment discrimination, harassment, retaliation, or wrongful termination. (Doc. 10, p. 1).

In Response, Stirrup filed a combined Opposition to Defendants' Motion and a Motion for Partial Summary Judgment ("MPSJ"). (Doc. 12). Stirrup asserts that she never entered into an arbitration agreement with EM and she was not aware of the ADR Policy until August 2013,

several months after her constructive discharge. (MPSJ, p. 3).

After the Motion to Compel Arbitration and MPSJ were briefed, the Ninth Circuit decided *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9th Cir.2014) and the Court requested supplemental briefing in light of *Davis*. (See Docs. 22, 25, 26). After oral argument, Stirrup filed a notice of Supplemental Authority Re First Motion for Partial Summary Judgment (Doc. 31), discussing the recent Ninth Circuit decision in *Nguyen v. Barnes & Noble, Inc.*, — F.3d. —, 2014 WL 4056549 (9th Cir. Aug. 18, 2014), and EM filed a Response to Plaintiff's Supplemental Authority (Doc. 32).

#### STANDARD

"The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.* reflects a 'liberal policy in favor of arbitration.' " *Davis*, 755 F.3d at 1092 (quoting *AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740 (2011)). It is well-settled that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [s]he has not agreed so to submit.' " *Samson v. Nama Holdings, LLC*, 637 F.3d 915, 923 (9th Cir.2011) (quoting *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002)); *see also Davis*, 755 F.3d at 1092 (a contract to arbitrate will not be inferred absent a clear agreement). Further, the "district 'court's role under the [FAA] ... is limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Samson*, 637 F.3d at 923–24 (quoting *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir.2000)).

"A motion to compel arbitration is decided according to the standard used by district courts in resolving summary judgment motions pursuant to Rule 56. Fed.R.Civ.P." *Coup v. The Scottsdale Plaza Resort, LLC*, 823 F.Supp.2d 931, 939 (D.Ariz.2011) (citations omitted). " 'If there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury.' " *Id.* (quoting *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1141 (9th Cir.1991)). Thus, " '[o]nly when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement.' " *Id.* (quoting *Three Valleys*, 925 F.2d at 1141); *see also Interbras Cayman Co. v. Orient Victory Shipping, Co.*, 663 F.2d 4, 7 (2d Cir.1981) ("To make a

genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial." Where there is a question of fact, and the party alleged to be in default of the arbitration agreement requests a jury trial, the matter shall be decided by jury. *See* 9 U.S.C. § 4; *see also Simpson v. Inter-Con Security Sys., Inc.*, 2013 WL 1966145 (W.D.Wash. May 10, 2013) (the court decides the question of whether the parties agreed to arbitrate on summary judgment if there is no dispute of material fact, otherwise the court conducts a jury or bench trial).<sup>1</sup>

\*3 Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] ... which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party's evidence is presumed true and all inferences are to be drawn in the light most favorable to that party. *Eisenberg v. Insurance Co. of North Amer.*, 815 F.2d 1285, 1289 (9th Cir.1987).

Only disputes over facts that might affect the outcome of the suit will prevent the entry of summary judgment, and the disputed evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, if the record taken as a whole "could not lead a rational trier of fact to find for the nonmoving party," summary judgment is warranted. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir.2006) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). If the burden of persuasion at trial would be on the nonmoving party, the movant may carry its initial burden of production under Rule 56(c) by producing, "evidence negating an essential element of the nonmoving party's claim or defense ...," or by showing, after suitable discovery, that the "nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1105–1106 (9th Cir.2000).

Because the summary judgment standard applies to the parties' respective motions, the Court, in essence, is resolving cross-motions for summary judgment. The Ninth Circuit instructs that "[w]hen parties file cross-motions for summary judgment, we consider each motion on its merits. *American Tower Corp. v. City of*

*San Diego*, — F.3d. —, 2014 WL 3953765, \*3 (9th Cir. Aug. 14, 2014) (citing *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.2001)). Further, “the district court [is] required to review the evidence properly submitted in support of [plaintiff’s cross-motion for summary judgment] as to determine whether [plaintiff] presented an issue of material fact precluding summary judgment in favor of Defendants.” *Fair Housing Council of Riverside County, Inc.*, 249 F.3d at 1135 (footnote omitted); see also *id.* at 1134 (“We hold that, when simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them.”); *Walters v. Odyssey Healthcare Management Long Term Disability Plan*, 2014 WL 4371284, \*3 (D.Ariz. Sept. 4, 2014) (“when multiple parties submit cross-motions for summary judgment, the Court considers each motion on its own merits but must consider all of the evidence presented in determining whether a genuine issue of material fact exists.”).

**\*4 EVIDENCE BEFORE THE COURT.** On October 3, 2012, almost 4 years after Plaintiff began employment with EM, an e-mail was sent to employees notifying them of the adoption of the ADR Policy and providing a link to the Policy as follows:

[EM] has implemented an Alternative Dispute Resolution Policy<sup>[2]</sup> to promptly and fairly address all work-related disputes. This new policy is being distributed to all employees and allows for both informal and formal avenues for resolving concerns. This Policy is a term and condition of your continued employment with [EM] Please *click here* to access the ADR Policy.

Please acknowledge *by clicking here* that you received, reviewed and agree to comply with the Alternative Dispute Resolution Policy. Questions regarding the Alternative Dispute Resolution Policy should be directed to your appropriate Human Resources or Employee Relations Representative.

(Doc. 10, p. 3 (quoting Exh. 2, ¶ 3) (underline in original); see also Doc. 10, Exh. 1, ¶ 4 (Vice President of Employee Relations Trisha Earls stating that on October 3, 2012, Stirrup received an e-mail with the language set out above)). EM submitted a declaration from August Thalman IV, the software engineer who wrote the program to distribute the e-mail<sup>3</sup>, explaining the steps to enter acceptance of the ADR Policy, which included that: “Plaintiff clicked on the link in the ...

e-mail and was taken to a login Screen[ ]” which required Plaintiff “to affirmatively enter her unique Username and Password<sup>[4]</sup> in order to enter the ‘Alternative Dispute Resolution Policy Acceptance’ page.” (Doc. 10, Exh. 2, ¶ 4 & internal exh. A). Thereafter, she had to click the “accept” button to show her agreement to the ADR Policy,<sup>5</sup> and she would then be taken to “the Alternative Dispute Resolution Policy Acceptance Summary Screen” which informed: “Your acceptance has been successfully recorded.” (*Id.* at ¶¶ 5–6). Thalman attaches to his declaration “shots” of computer screens which he says show: (1) Stirrup entered her unique user name and password into the ADR Policy Acceptance page on October 3, 2012; (2) Stirrup checked the box indicating she accepted and agreed to the ADR Policy (Doc. 10, Exh. 2 (internal exh. B)); (3) Stirrup viewed the ADR Policy Acceptance Summary Screen (Doc. 10, Exh. 2 (internal exh. C)). (Doc. 10, Exh. 2, ¶¶ 4–6). Thalman also attaches a screen shot which he identifies as a “Result Message” confirming that Stirrup, identified as Employee Profile Number 85884, accepted the ADR Policy on October 3<sup>6</sup>, 2012 at 16:07 (4:07 p.m.). (*Id.* at ¶ 7 & internal exh. D). Thalman states that all the above were completed using the IP address assigned to the network at AiTU where Stirrup’s work computer is located. (*Id.* at ¶ 9). “When Plaintiff electronically accepted the ADR [P]olicy, a record of her acceptance was automatically entered into a secure database[ ]” that could only be altered by the employee’s use of the application. (*Id.* at ¶ 10). The secure database is password protected and maintained exclusively by EM’s Information Technology Department. (*Id.*). No one at AiTU has such access. (*Id.*). No one has requested or received access to change any such information regarding Stirrup. (*Id.*). Thalman also states that Stirrup received the October 3, 2012 e-mail. (*Id.* at ¶ 3).

**\*5** Brian Castle, EM’s Database Services Manager reaffirms Thalman’s statements concerning communications received from Stirrup’s unique user name, password, and IP address, and that no one could alter the secure database containing the October 3, 2012 information recorded from Stirrup’s computer unless that person had approval from two different people and no such approval was sought. (Doc. 18, Exh. 4, ¶¶ 1, 4, 5).

EM also submits a declaration from Linda Hunter, Vice President of Human Resources for the Art Institutes, stating that on January 11, 2013, an e-mail entitled “Updates to Handbook and HR Policies” was sent to all employee e-mail addresses. (Defendants’ Reply in Support of Motion to Compel Arbitration and Stay of Proceedings and Response to MPSJ (Doc. 18), Exh. 2, ¶

10). The e-mail stated: “ ‘Pleased be advised that the documents listed below have recently been updated.’It then instructed all employees to ‘Please take the time to review the revised content.’The ‘documents listed below’ included ‘Employee Handbook (revision date, December 2012)[ ]’ and the e-mail contained a link to the revised Employee Handbook which “linked to the e-mail contained [sic] [EM’s] recently implemented [ADR] Policy as pages 20 through 24 of the Handbook.”(*Id.* at ¶¶ 11, 13, 14).<sup>7</sup>

Stirrup submits her sworn declaration statement that she never received “any notification at any time or in any way during my employment that EM had implemented or added or imposed any”... ADR Policy and if she had, she would not have assented to it but would have instead resigned. (Plaintiff’s Statement of Facts (“SOF”) (Doc. 11), Exh. 1, ¶¶ 18–10; see also *id.* ¶ 9). Stirrup explains her rationale for resigning from a job she has held since 2008, rather than agreeing to arbitration, as follows:

I have a masters [sic] degree in management and would be very concerned about any limitations upon legal rights I would have in the event of any dispute with my employer. It’s common knowledge in the business world that employers try to force their employees to give up their rights to file lawsuits when their legal rights are violated, and divert them into private non judicial arbitration where employees’ [sic] rarely prevail because the employers are regular “repeat customers” for the private arbitration companies, and if the arbitration companies don’t favor their “regular customers” with favorable results, their customers will go elsewhere, to some competing arbitration company. One only need look at the fee schedules charged by arbitration companies, particularly the AAA Employment Dispute Rules. These very high fees provide great income for the arbitration companies, which have minimal overhead....

\* \* \*

If I had been notified of the [ADR Policy] ... at any time before I was constructively discharged in May, 2013, I would not have assented to or worked subject to such an [ADR Policy]. If it was imposed upon me on a “take it or leave it basis”, I would have resigned, particularly since in October 2012, when it was supposedly transmitted to EM employees, I was already suspicious about possible illegal activities at EM and the consequences to me of doing something about such activities.

\*6 (Doc. 11, Exh. 1, ¶¶ 9–10).

Stirrup states she has never seen the computer screens that were submitted with EM’s Exhibits. (*Id.* at ¶ 11). Stirrup also rebuts EM’s statement that she received and/or acknowledged notice of the ADR Policy on Wednesday, October 3, 2012 at 4:07 p.m., by pointing out that she was not at her desk at that time:

[T]hat week was the first week of the new quarter at AiTU, and I recall with certainty that I was away from my office and computer that afternoon, well before and well after 4pm, because my duties were to go to each classroom that afternoon to personally verify attendance in every single class.

(*Id.*, Exh. 1, ¶ 4).<sup>8</sup>

Stirrup also denies receiving an e-mail regarding the ADR Policy on January 11, 2013 as alleged in Hunter’s declaration. (Doc. 20, Exh. 1, ¶ 5). Stirrup stresses that during her employment, she “read every e-mail I received because all such business communications were important to me and part of my duties.”(*Id.* at ¶ 12). Further, the only employee handbook Stirrup was ever given was revised May, 2011 and she has never before seen the version of the employee handbook attached to EM’s Response. (*Id.* at ¶¶ 10–11).

Stirrup asserts that her password information was known to all EM IT employees including Thalman and Stacy Genchie, who is the EM Regional IT Director and who used Stirrup’s password information when attempting to correct a software issue. (Doc. 11, Exh. 1, ¶ 12), and “the new [Art Institute] IT female employee (whose name I do not recall, who assumed her job shortly before I left [in May 2013] ) told me to write my password down (during my last 2 weeks), because the AiTU Director (CEO) Ralph William Van Zwol III wanted me to use a laptop instead of my desktop. I did as instructed and my password/log-in information was there for anyone to see in plain view at my workstation.”(*Id.*). Stirrup also submits a declaration from AiTU IT specialist and co-worker Sean Baker that employees have given him and other IT technicians their passwords to resolve equipment issues, and he recalls asking Plaintiff “at one point in time ...” for her password for work purposes and she supplied it. (Doc. 20, Exh. 2, ¶¶ 6–7). Further, there is no formal process for requesting and receiving such passwords. (*Id.* at ¶ 6).

**DISCUSSION.**

At the outset, the Court addresses Stirrup's challenges to the documents attached at A through C to Thalman's declaration and upon which EM relies to support its position that Stirrup received and assented to the ADR Policy. (Doc. 12, pp. 5–9). According to Stirrup, the exhibits "are basically blank screens or views that depict absolutely nothing." (*Id.* at p. 7). Stirrup further argues that the declarations submitted by Thalman and Earls lack foundation and are hearsay given that they "offer no proof as to how either Declarant would know for certain ..." that Stirrup received the e-mail, especially given that "[n]either Declarant alleges they were present with Stirrup when such e-mail(s) were sent or received...." (*Id.* at p. 8).

\*7 Stirrup's argument is well-taken with regard to Earls' Declaration. Earls, who states that she was responsible for assisting all of the EM "schools in rolling out the ADR Policy to all existing employees" (Doc. 10, Exh. 1, ¶ 2), does not provide any basis whatsoever to support her statement at paragraph 4 of her declaration that Stirrup received the October 3, 2012 e-mail, and the Court will not consider this statement.

Thalman, on the other hand, states that he personally wrote the program that sent the "bulk e[-]mail to employees of the Art Institute ...", including Stirrup, on October 3, 2012. (*Id.*, Exh 2, ¶ 3). While the screen shots attached to Thalman's Declaration may require some explanation, Thalman's Declaration does just that. He also avows that the screen shots he references are true and accurate. (*Id.* at ¶¶ 4–7). Moreover, EM also submits the Declaration of Database Services Manager Brian Castle confirming that "the record reflecting Ms. Stirrup's agreement to the ADR Policy was submitted using her unique Username and Password from [her assigned] IP address....[T]he record has not been changed since it was recorded and stored in the secure database on October 3, 2012 at 4:07 p.m. and I can confirm that the record is a true and accurate reflection of the record submitted utilizing Ms. Stirrup's unique Username and Password from [her assigned] IP address...." (Doc. 18, Exh.4, ¶¶ 4–5)).

With regard to summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Rule 56. *Celotex*, 477 U.S. at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."). Plaintiff does not argue that the screen shots "cannot be presented in a form that would be admissible in evidence." Fed.R.Civ.P.

56(c)(2). A fair reading of Thalman's and Castle's declarations supports the conclusion that the records submitted qualify as business records falling within the hearsay exception at Fed.R.Evid. 803(6). *See e.g. U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043–45 (9th Cir.2009) (citations omitted). Further, Fed.R.Evid. 901 "states that for authentication there must be 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir.1996). "A document can be authenticated by the testimony of a witness with knowledge." *Id.* (citation omitted). The proponent of the evidence "need only make a prima facie showing of authenticity 'so that a reasonable juror could find in favor of authenticity or identification.'" *Id.* (quoting *United States v. Chu Kong Yin*, 935 F.2d 990, 996 (9th Cir.1991)). "Once the prima facie case for authenticity is met, the probative value of the evidence is a matter for the jury." *Id.* Knowledge may be inferred from a declarant's professional position. *In re Kaypro*, 218 F.3d 1070, 1075 (9th Cir.2000). On the instant record, Thalman's declaration and attached screen shots are properly considered in resolving the pending motions. However, Thalman's statements that Stirrup received the e-mail and/or that she was the person who clicked on the various links and accept box are unsupported. Thalman only has knowledge that someone using Stirrup's username and password made the entries from the IP address assigned to AiTU where Stirrup's work computer was located, and the Court considers Thalman's statements mindful of this limitation.

\*8 **EM's Motion to Compel Arbitration.** EM argues that Stirrup has not established a question of fact as to whether she assented to the ADR Policy. According to EM, arbitration is mandated by the fact that Stirrup continued working at AiTU after the October 2012 notification to employees about implementation of the ADR Policy. (Doc. 18, p. 3<sup>rd</sup>). To support this position, EM relies heavily on a decision from this District in *EEOC v. Cheesecake Factory*, 2009 WL 1259359 (D.Ariz. May 6, 2009). In *Cheesecake Factory*, the court recognized that: " 'At-will employment contracts are unilateral and typically start with an employer's offer of a wage in exchange for work performed; subsequent performance by the employee provides consideration to create the contract.' " *Cheesecake Factory*, 2009 WL 1259359, at \*4 (quoting *Demasse v. ITT Corp.*, 194 Ariz. 500, 984 P.2d 1138, 1142–43 (Ariz.1999)). Moreover, because an at-will employment relationship can be modified at any time, the employer has the right to change the arbitration agreement and exercising that right would merely create a new offer of employment for the future, and the employee may accept that new offer by performance—i.e.,

continuing to work for the employer. *Id.* (citations omitted); see also *Davis*, 755 F.3d at 1094 (under California<sup>9</sup> law, where an employee continues in his or her employment after being given notice of the changed terms or conditions, she has accepted those new terms or conditions). EM also relies on *Cheesecake Factory* for the premise that there is no requirement that the employee affirmatively assent to the arbitration policy. However, EM overlooks that *Cheesecake Factory* did not involve the question whether the employees had notice of such policy. In *Cheesecake Factory*, the employees signed a two-page document stating they had received the employee handbook and initialed paragraphs about the arbitration policy. Instead, the issue in *Cheesecake Factory* concerned whether the arbitration agreement was unconscionable. Likewise, *Batiste v. U.S. Veterans Initiative*, 2012 WL 300729, \*1 (D.Ariz. Feb. 1, 2012), also cited by EM for premise that the employee did not have to assent to the arbitration policy, is distinguishable because although it is not clear whether employee signed any agreement containing the arbitration provision, there was no dispute that he read the Employee Handbook containing the mandatory arbitration provision.

EM also argues that even if Stirrup “failed to read ... [the October 2012 and January 2013<sup>11</sup>] e-mails, their distribution to Plaintiff is sufficient to bind her.” (Doc. 18, pp. 9–10 (citing *Coup*, 823 F.Supp.2d 931 (citing *Darner Motor Sales Inc. v. Universal Underwriters Insur. Co.*, 140 Ariz. 383, 394, 682 P.2d 388, 399 (Ariz.1984)); *Ellerbee v. GameStop, Inc.*, 604 F.Supp.2d 349, 354 (D.Mass.2009)). However, it was undisputed in *Coup* and *Ellerbee* that the respective plaintiffs received notice of the arbitration policy. See e.g. *Coup*, 823 F.Supp.2d at 949 (“there is no evidence that Plaintiffs’ were not given a copy of [defendant’s] arbitration procedures ...”). Instead, the issue in *Coup* involved the plaintiffs’ failure to read the employee manual containing the arbitration policy and the employer’s alleged failure to provide adequate time to do so. *Id.* Likewise, in *Ellerbee*, the issue did not involve whether the plaintiffs received notice of the policy, but rather whether their refusal to sign the rules prevented the plaintiffs from being bound by the arbitration policy. *Ellerbee*, 604 F.Supp.2d at 355. Unlike the plaintiffs in *Coup* and *Ellerbee* who did not dispute that they received the arbitration policy, Stirrup denies that she received the ADR Policy at issue. As such, *Coup* and *Ellerbee* are inapposite.

<sup>9</sup>In contrast to cases cited by EM where the parties had in fact received the arbitration policy, the issue here is whether Stirrup had notice of the ADR Policy. In *Davis*, the Ninth Circuit determined that under California law, the employer was required to provide employees with “reasonable notice” of the modification.<sup>12</sup>*Davis*, 755 F.3d

at 1093 (also noting that if an employer has a prescribed method of notice of modification, it is incumbent upon the employer to follow such method). The *Davis* court held that the employer “satisfied the minimal requirements under California law for providing employees with reasonable notice of a change to its employee handbook by sending a letter to ...” the employees informing them of the modification, *id.* at 1094, together with “a copy of the entire Dispute Resolution Program, including the arbitration provision.” *Id.* at 1092 (also holding that under California law the employer was not required to inform the employee that continued employment constituted their assent to the arbitration provisions).

EM argues that Stirrup presents nothing but speculation to support her opposition to the Motion to Compel Arbitration. Although Stirrup states that Thalman and Genchie had access to her password information, she does not specify when they had such access. She submits an affidavit from EM IT specialist Baker that during his employment at AiTU from July 2012 to December 2012, employees including Stirrup gave him their passwords to resolve computer issues. She also states that during her last two weeks of employment in May 2013, she was required to write her password down and her “password/log-in information was there for anyone to see in plain view at my work station.” (Doc. 11, Exh. 1, ¶ 12). Of course, this latter instance occurred after October 3, 2012 and, thus, is irrelevant to the matter at hand. Even assuming that Thalman and Genchie or other IT employees, like Baker, had access to Stirrup’s password information during the relevant time, Stirrup provides no rationale whatsoever as to why one of them would have accessed her e-mail on October 3, 2012 and accepted the ADR Policy. “Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence....” *Matsushita*, 475 U.S. at 596. Although Stirrup states in her declaration that by October 2012 she had suspicions “about possible illegal activities” at EM (Doc. 11, Exh. 1, ¶ 10), she does not cite any instances of such alleged illegal activity occurring until 2013 (see Doc. 1 at ¶¶ 18–19), and she does not allege or state that she reported her suspicions to her superiors close in time to October 3, 2012.

However, speculation based on circumstantial evidence that someone else who had access to her computer login information might have entered her assent to the ADR Policy on October 3, 2012 is not all that Stirrup offers. She also submits her declaration that she “never received any notification at any time or in any way during my employment that EM had implemented or added or imposed any ...” ADR Policy. (Doc. 11, Exh. 1, ¶ 8; see also *id.* at ¶ 6 (“The first time [Stirrup] ever knew of or

heard of the ...” ADR Policy was after she had left EM’s employ)). Stirrup also states that she would not have assented to the ADR Policy in October 2012 because of her belief that arbitration favors employers and because by that time she had suspicions about possible illegal activity at EM and the consequences she might face if she reported it. (*Id.* at ¶¶ 9–10). She also states that she was not at her computer at the time when Thalman says she responded to the e-mail. (*See* Doc. 20, Exh. 1, ¶ 4).

\*10 EM argues that “[w]hile Plaintiff’s self-serving statements do establish that Plaintiff is willing to swear to absolutely anything in an effort to further her position in this litigation, they do not create a genuine dispute as to whether Plaintiff is bound by the ADR Policy. No reasonable fact-finder would credit Plaintiff’s self-serving after-the-fact fictional account in the face of EM[ ]’s substantial objective evidence establishing that, on October 3, 2012, she acknowledged receipt of the ADR Policy.” (Doc. 18, p. 7). Defendant overlooks “the long-standing rule that credibility may not be resolved by summary judgment...”*McLaughlin v. Liu*, 849 F.2d 1205, 1207 (9th Cir.1988) (citing *Anderson*, 477 U.S. at 255). Stirrup’s statements that she did not receive the e-mail, was never notified about the ADR Policy, and was away from her computer at the relevant time are “direct evidence of the central fact in dispute. [Stirrup] does not ask that inferences be drawn in [her] favor, but that [her] testimony be taken as true.”*Id.* at 1208. As the respondent to EM’s Motion, Stirrup’s evidence is to be believed. *Leslie v. Grupo, ICA*, 198 F.3d 1152, 1157 (9th Cir.1999). Thus, the Ninth Circuit has “specifically rejected the notion that a court could disregard direct evidence on the ground that no reasonable jury would believe it.”*Id.* at 1159 (citing *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n.*, 809 F.2d 626, 631 n. 3 (9th Cir.1987)); *see also McLaughlin*, 849 F.2d at 1208 (“We have upheld summary judgment on the basis of *Matsushita’s* ‘implausibility’ standard only where the non-movant relied on inferences from circumstantial evidence.”) (footnote omitted). “If the nonmoving party produces direct evidence of a material fact, the court may not assess the credibility of this evidence nor weigh against it any conflicting evidence presented by the moving party. The nonmoving party’s evidence must be taken as true.”*T.W. Elec. Contractors Ass’n.*, 809 F.2d at 631.

EM’s argument that Stirrup’s statements are self-serving is unavailing. *See United States v. Shumway*, 199 F.3d 1093, 1104 (9th Cir.1999) (stating plaintiff’s “affidavit was of course ‘self-serving,’...[a]nd properly so, because otherwise there would be no point in his submitting it” when reversing entry of summary judgment against

plaintiff where district court rejected affidavit as self-serving). “That an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact.”*Id.* Further, “[i]f the affidavit stated only conclusions, and not ‘such facts as would be admissible in evidence,’ then it would be too conclusory to be cognizable, but ...”, *id.* (footnote omitted), here Stirrup does state material facts based on her personal knowledge.

EM also attempts to undermine Stirrup’s credibility and ability to accurately remember events by challenging Stirrup’s statement that in May or June of 2013, EM Human Resources Manager Shannon Fulmer e-mailed her a copy of the employee handbook, “and the handbook said nothing about any arbitration process or the ...” ADR Policy. (Doc. 11, Exh. 1, ¶ 16). EM submits Fulmer’s declaration denying Stirrup’s statement that Fulmer e-mailed Stirrup the employee handbook; instead, Fulmer states she sent the Code of Conduct, which referenced EM’s non-retaliation policy. (Doc. 18, Exh. 3, ¶ 5; *see also id.* internal Exh. A (e-mail correspondence from Fulmer to Stirrup)). EM argues that if Stirrup “misrepresents to this Court the document she received in May 2013, just a few months prior to filing her Complaint, one must question her ability to credibly represent to this Court that she never received the October 3, 2012 e-mail ...” notifying her of the ADR Policy. (Doc. 18, p. 5).

\*11 “It is for the trier of fact to determine the credibility of plaintiff’s testimony.”*LaMarr v. American Bankers Life Assurance Co.*, 2006 WL 1160098, \*2 (D.Ariz. May 1, 2006) (denying summary judgment where plaintiff submitted statements that he never received the information that would have put him on notice of insurance policy’s limitations). Because Stirrup’s sworn statements constitute direct evidence of a material fact, Stirrup has satisfied her burden as the respondent to EM’s Motion to Compel Arbitration by pointing to evidence that creates a genuine issue of material fact. *See e.g. Id.; McLaughlin*, 849 F.2d at 1209 (“Because [defendant’s] sworn statement ... was direct evidence of a material fact ... the district court erred in granting summary judgment...” in favor of plaintiff) (internal quotation marks and citation omitted)). Consequently, EM’s Motion to Compel Arbitration and Stay These Proceedings Pending Arbitration is denied to the extent that the issue must proceed to a jury trial in accordance with § 4 of the FAA. **PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT.** In addition to asserting that she never received the October 2012 e-mail about implementation of the ADR Policy,<sup>13</sup> Stirrup argues that the “blast” e-mail in this case did not provide sufficient

notice. Plaintiff cites cases where courts have found insufficient notice when employees were notified of arbitration agreements via e-mail. (Plaintiff's Supplemental Brief (Doc. 26) citing *Campbell v. General Dynamics Gov't. Sys. Corp.* 407 F.3d 546 (1st Cir.2005); *Hudyka v. Sunoco, Inc.*, 474 F.Supp.2d 712 (E.D.Pa.2007)). These cases, however, did not hold that mass e-mail notice of arbitration policies was insufficient in and of itself. In fact, the First Circuit stressed that the use of mass e-mail is not determinative to the appropriateness of the notice. *Campbell*, 407 F.3d at 556. It was the content that rendered the notice insufficient in both *Campbell* and *Hudyka*. See e.g. *Campbell*, 407 F.3d at 557; *Hudyka*, 474 F.Supp.2d at 716–17. Like the Court in *Campbell*, this Court declines to hold that notice of an arbitration policy made by mass e-mail in and of itself is per se unreasonable and/or otherwise insufficient.

In challenging the sufficiency of notice, Stirrup relies heavily on *Campbell*, which she argues is indistinguishable from the instant case. (Doc. 26, p. 7). However, *Campbell* involved arbitration of claims under the American with Disabilities Act (“ADA”), and Stirrup’s action does not. In the First Circuit, which decided *Campbell*, “[w]hen a party relies on the FAA to assert a contractual right to arbitrate a claim arising under a federal employment discrimination statute, the court must undertake a supplemental inquiry ...” to determine whether “Congress, in enacting a particular statute, intended to preclude a waiver of a judicial forum for certain statutory claims.” *Campbell*, 407 F.3d at 552. The First Circuit determined that “[t]he appropriateness of enforcing an agreement to arbitrate an ADA claim hinges on whether, under the totality of the circumstances, the employer’s communications to its employees afforded ‘some minimal level of notice’ sufficient to apprise those employees that continued employment would effect a waiver of the right to pursue the claim in a judicial forum.” *Id.*; see also *Kummetz v. Tech Mold Inc.*, 152 F.3d 1153, 1155 (9th Cir.1998) (an agreement to arbitrate disputes arising under the ADA or Title VII “must at least be knowing, which means that [ ] the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.[ ]”) (internal quotation marks and citation omitted). In contrast, *Davis* where the ADA was not at issue, the Ninth Circuit found notice was reasonable where the employer sent a letter notifying the employee that modifications had been made and included a copy of the alternative dispute resolution policy and the arbitration provision. Compare with *Hudyka*, 474 F.Supp.2d 712 (e-mail notice was insufficient where, *inter alia*, there was no evidence that employees received a copy of the policy). Because Stirrup does not advance a

claim under the ADA or other federal employment discrimination statute, *Campbell* is distinguishable. See e.g. *Awuah v. Coverall North America, Inc.*, 703 F.3d 36, 45–46 (1st Cir.2012) (“*Campbell* limited its holding to ‘purported waiver[s] of the right to litigate ADA [Americans with Disabilities Act] claims.’”) (citing *Campbell*, 407 F.3d at 559).

\*12 Stirrup also takes specific issue with the fact that EM used a link to provide access to the ADR Policy. (See e.g. Doc. 31). Certainly, an obscure link could tend to support a finding against the employer. See e.g. *Campbell*, 407 F.3d at 548–49 (finding fault with link embedded at the bottom of the e-mail); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 23 (2d Cir.2002) (declining to enforce terms of use that “would have become visible to plaintiffs only if they had scrolled down to the next screen”). In addition to *Campbell* and *Specht*, Stirrup also cites the Ninth Circuit’s recent decision in *Nguyen*, addressing agreements to arbitrate in the consumer context over the internet, which held that even if a website uses a “conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.” *Nguyen*, — F.3d. —, 2014 WL 4056549 at \*6. In contrast to the cases upon which Stirrup relies, the October 3, 2012 e-mail, which consisted of two paragraphs, reflects the link to the ADR Policy was by no means obscure, but was contained within the message language itself, appearing as the last sentence of the first paragraph: “Please click here to access the ADR Policy.” (Doc. 10, Exh. 2, ¶ 3). Upon clicking the link, the user would have access to the entire ADR Policy. Moreover, EM also required employees to enter acceptance of the ADR Policy and employees were informed that the ADR Policy was a term and condition of continued employment.

Stirrup also argues, “[f]or notice of this importance, EM could or should have ... used e-mail which it sent directly to the employee and then confirm receipt by requiring an e-mail response from the employee (which EM did not do, and EM has no e-mail confirmation from Stirrup)...” (Doc. 26, p. 6). Stirrup’s suggested procedure for notice is essentially what EM contends occurred in this case. First, as discussed *supra*, the case law does not reject notice merely because it was distributed by mass e-mail. Further, EM did in fact require the employee to affirmatively “accept” the ADR Policy. Compare *Hudyka*, 474 F.Supp.2d 712 (e-mail notice was insufficient where, *inter alia*, the employee was not required to manifest his

intention to be bound by the agreement). Requiring the employee to click on the “accept” box is akin to Stirrup’s suggestion that the employee send an e-mail confirming receipt and acceptance, and Stirrup articulates no meaningful difference between the two methods.<sup>14</sup> The procedure employed by EM in October 2012 case is not significantly different from the process Stirrup suggests constitutes adequate notice.

Stirrup submits her sworn statements that she never received the e-mail, she never was informed about the ADR Policy while working at EM, and that she was not at her computer when the e-mail was sent and when an acceptance was entered using her password and unique user name. Stirrup also states that other EM employees had access to her computer log-in information, though she provides no motive why these employees would access her e-mail in October 2012 and enter her acceptance of the ADR Policy.

\*13 While all inferences are to be drawn in EM’s favor as the non-moving party responding to Stirrup’s motion, EM must produce evidence to support its claim or defense by more than simply showing “there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. EM has produced evidence that management had “significant discussions around the topic of ensuring ... that the ADR Policy was distributed to *all* employees’ e-mail addresses.” (Doc. 18, Exh. 2, ¶ 2) (emphasis in original). In furtherance of that goal, Thalman wrote the program that would send the e-mail to all Art Institute employees on October 3, 2012. (Doc. 10, Exh. 2, ¶ 3). EM has submitted copies of screen shots, which Thalman attests are true and accurate, indicating that Stirrup’s unique user name and password were entered from AiTU’s IP network address, in order to: (1) access the ADR Policy acceptance page; and (2) place a check mark in a box indicating the ADR Policy was accepted. (*Id.* at ¶¶ 4–5 (internal exhs. A, B).

As discussed, *supra*, EM also challenges Stirrup’s ability to recall events by submitting Fulmer’s declaration that she did not send Stirrup the employee handbook, as Stirrup contends, but, instead, Fulmer sent Stirrup the Code of Conduct. (Doc. 18, Exh. 3, ¶ 5; *see also id.* internal Exh. A (e-mail correspondence from Fulmer to Stirrup)).

Drawing all inferences in favor of EM supports the conclusion that EM has pointed to evidence that calls Stirrup’s credibility into question. Credibility determinations are the province of the trier of fact. Consequently, EM has set forth facts upon which a rational jury might return a verdict in its favor based on

the evidence. *See T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 631 (9th Cir.1987) (citing *Anderson*, 477 U.S. at 257). As such, Stirrup’s MPSJ is denied. **ARIZONA’S ELECTRONIC TRANSACTION ACT.** Stirrup also argues that the October 3, 2012 e-mail failed to comply with the Arizona Electronic Transactions Act (“AETA”), A.R.S. § 44–7001, *et seq.* (Doc. 12, pp. 7–8). AETA provides in pertinent part:

If the parties to a transaction have agreed to conduct the transaction by electronic means and a law requires a person to provide, send or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent or delivered, as the case may be, in an electronic record that is capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or the sender’s information processing system inhibits the ability of the recipient to print or store the electronic record.

A.R.S. § 44–7008(A). There is no showing that the e-mails sent by EM failed to comply with AETA. EM submits Castle’s declaration statement that “Ms. Stirrup was able to retain, print, and store a copy of the ADR Policy and the screen confirming her agreement to the ADR Policy if she chose to do so.” (Doc. 18, Exh. 4, ¶ 6). Stirrup cites four additional requirements: (1) the recipient must be given an opportunity to print out and be provided with a hard copy; (2) the employee must be informed of the hardware and software required to access and receive such information; (3) the employee must be informed how to withdraw consent to receiving documents in electronic form; and (4) the employee must be told how to obtain a hard copy of the electronic document. (Doc. 12, p. 7). EM correctly asserts that these four “requirements” are not found in AETA. (Doc. 18, p. 9). Stirrup fails to establish a genuine issue of material fact on this issue and her MPSJ as it pertains to AETA is denied.

#### PLAINTIFF’S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

\*14 Stirrup argues that her claims are not subject to arbitration in light of the Dodd–Frank Act. In 2010,

Congress passed the Dodd—Frank Act which, in part, amended the Sarbanes—Oxley Act (“SOX”) to bar the arbitration of whistleblower claims. *Wong v. CKX, Inc.*, 890 F.Supp.2d 411, 421 (S.D.N.Y.2012). In light of that amendment, SOX now provides:

No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under [the Sarbanes—Oxley whistleblower protection provision].

*Id.*(quoting 18 U.S.C. § 1514(e)(2)). SOX sets out “six categories of employer conduct against which an employee is protected from retaliation for reporting: violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1348 (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.”*Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dep’t. of Labor*, 717 F.3d 1121, 1130 (10th Cir.2013) (discussing 18 U.S.C. § 1514A(a)(1)). The Ninth Circuit has made clear that “[a] plaintiff seeking whistleblower protection under SOX must first file an administrative complaint with OSHA ...” not later than 90 days after the date on which the violation occurs.*Coppinger—Martin v. Solis*, 627 F.3d 745, 749(9th Cir.2010); *see also Lockheed Martin Corp.*, 717 F.3d at 1128, (plaintiff bringing claim under SOX first filed administrative complaint with OSHA); *Wong*, 890 F.Supp.2d 411 (same).

Stirrup argues that her claims are protected under SOX because they “contain all the elements of at least three of the specific offenses listed in 18 U.S.C. [§ ] 1514A(a)...”, such as: 18 U.S.C. § 1341 (frauds and swindles); 18 U.S.C. § 1343 (wire fraud); and 18 U.S.C. § 1344 (bank fraud—“student loans from banks based upon misrepresentations by EM”). (Plaintiff’s Second Motion for Partial Summary Judgment (“MPSJ2”) (Doc. 23), pp. 4–8). However, Stirrup also asserts that she was not required to exhaust administrative remedies under SOX, because she “does not present any claim under SOX; her Complaint plainly states she is seeking relief solely upon her claims for relief for (1) Discrimination (constructive discharge) in violation of the False Claims Act, 31 U.S.C. [§ ] 3730(h), and (2) and [w]rongful termination of employment ... in violation of Arizona law.”(MPSJ2 Reply (Doc. 29), p. 2; *see also id.* at pp. 3–5).

The Dodd—Frank Act amended the whistleblower

provisions of SOX. *James v. Conceptus, Inc.*, 851 F.Supp.2d 1020, 1029–30 (S.D.Tex.2012)“Dodd—Frank did not similarly amend the False Claims Act’s antiretaliation provision under which [Plaintiff] sues.”(*Id.*). (“Dodd—Frank’s antiarbitration amendments to other statutes cannot be extended by implication to the antiretaliation provisions of the False Claims Act, especially when Dodd—Frank amended other parts of the False Claims Act but not the provision at issue.”) “When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”*Id.* at 1030 (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009)). Stirrup has framed her claims under the False Claims Act and Arizona law. As such, her claims do not qualify for the Dodd—Frank antiretaliation amendment to SOX, and Plaintiff’s MSPJ2 arguing otherwise is denied.

## CONCLUSION

\*15 Stirrup has presented evidence sufficient to establish a genuine issue of material fact so as to defeat EM’s Motion to Compel Arbitration and to require a jury to determine whether a valid arbitration agreement exists. Likewise, EM has presented evidence sufficient to establish a genuine issue of material fact so as to defeat Stirrup’s Motion for Partial Summary Judgment on the issue of whether a valid arbitration agreement exists. Additionally, Stirrup fails to establish that she is entitled to summary judgment under Arizona’s Electronic Transaction Act or the Sarbanes—Oxley Act. Therefore, Plaintiff’s motions for partial summary judgment are denied.

Accordingly, IT IS ORDERED that:

- (1) Defendants’ Motion to Compel Arbitration and Stay These Proceedings Pending Arbitration (Doc. 10) is DENIED to the extent that the matter must proceed to jury trial on the issue whether a valid arbitration agreement exists;
- (2) Plaintiff’s Motion for Partial Summary Judgment (Doc. 12) is DENIED; and (3) Plaintiff’s Second Motion for Partial Summary Judgment (Doc. 23) is DENIED.

IT IS FURTHER ORDERED that this matter is SET for a status conference **THURSDAY, OCTOBER 16, 2014 AT 1:45 P.M.** in Courtroom 5F.

## Footnotes

- 1 Stirrup has requested a jury trial of the claims underlying her complaint and she has requested a jury trial on the issue whether there is a valid arbitration agreement. (Doc. 1; Doc. 12, p. 15).
- 2 The ADR Policy provides in relevant part that: "Accepting or continuing employment with the Company after receipt of this Policy constitutes agreement to abide by its terms." (Doc. 10, p. 2 (quoting Exh. 1, ¶ 3 (internal exh. A))).
- 3 At oral argument Plaintiff's counsel stated that Stirrup did not dispute that Thalman wrote a program that sent out the e-mail.
- 4 Stirrup was required to change her unique password every 90 days. Thalman states that prior to October 3, 2012, Stirrup "last reset her password on July 30, 2012 using the same Username and IP address she used to accept the ADR [P]olicy." (Doc. 10, Exh. 2, ¶ 18).
- 5 The Acceptance Screen includes the following language:  
[EM] has implemented an Alternative Dispute Resolution Policy to promptly and fairly address all work-related disputes. This policy allows for both informal and formal avenues for resolving concerns. Please click here to access the Alternative Dispute Resolution Policy. This Policy is a term and condition of your continued employment with [EM].  
By clicking below, I agree to abide by the terms of the Alternative Dispute Resolution Policy. I agree that if I have any dispute with the Company arising out of my employment, I will use the Company's Alternative Dispute Resolution Policy as the exclusive means for resolving such dispute. I further acknowledge that I have been given the opportunity to review the terms of the Company's Alternative Dispute Resolution Policy, as well as the opportunity to have any questions about that Policy answered.  
(Doc. 10, Exh. 2, (internal exh. B)).
- 6 Thalman's declaration actually states that the "Result Message" was dated October 10, 2012, however, EM asserts that reference to October 10, 2012 was a typographical error and Thalman's declaration should instead read that the Result Message was dated October 3, 2012. EM points out that the screen shot referenced by Thalman reflects an October 3, 2012 date stamp. (Reply (Doc. 18), p. 6 n. 1).
- 7 The ADR Policy beginning at p. 20 of the Employee Handbook cited by Hunter indicates the Policy applies to individuals who *inter alia*, were "employed on or after the Effective Date of this Policy." (Doc. 18, Exh. (internal exh. D at pp. 20–24)).
- 8 Attached to Plaintiff's Reply to Response to Her Motion for Partial Summary Judgment (Doc. 20) are: (1) the "Second Declaration of Plaintiff Joi N. Stirrup"; and (2) the Sworn Declaration of Sean Baker, who worked at AiTU as an IT specialist from July 2012 to December 2012. (Doc. 20, Exhs. 1, 2). "Ordinarily, a district court will not consider evidence in the context of a motion for summary judgment that is submitted for the first time in reply. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the non-movant an opportunity to respond") (internal alteration and quotation marks omitted)." *Head v. Kommandit-Gesellschaft MS San Alvaro Offen Reederei GmbH & Co.*, — F.3d. —, 2014 WL 688645, \*6 n. 11 (W.D. Wash. Feb. 21, 2014). Since the filing of Stirrup's Reply and additional exhibits, the parties have briefed Plaintiff's Second Motion for Partial Summary Judgment and have filed supplemental memoranda regarding recently decided cases. At no time has EM objected to Stirrup's submission of the additional declarations or requested leave to file a sur-reply or additional evidence in response. "[B]y failing to object to or otherwise challenge the introduction of the [evidence submitted in reply] in the district court, [the non-moving party has] waived any challenge on the admissibility of th[e] evidence." *Getz v. Boeing Co.*, 654 F.3d 852, 868 (9 Cir. 2011); see also *Head*, — F.3d. at —, 2014 WL 688645 at \*6 n. 11 ("Because [plaintiff] has not objected to [defendant's] introduction of an additional declaration in reply, the court may in its discretion consider this evidence when deciding [defendant's] motion for summary judgment."). Given that EM has seen no reason to object to the submission of additional declarations with Stirrup's Reply, the Court will exercise its discretion to consider this evidence in resolving the pending motions. See *id.*
- 9 Reference to page numbers correlate to the page number assigned by the CM/ECF System appearing at the top of each page of Doc. 18.
- 10 Stirrup has not disputed EM's assertion that "[t]here is no meaningful difference between the Arizona state contract law principles applicable in this case and the California state contract law principles applied by the *Davis* court." (Supplemental Brief (Doc. 25), p. 2)
- 11 EM's distribution of the January 2013 e-mail notice about the "Update to Handbook and HR Policies" (Doc. 18, Exh. 2, ¶ 10), alone, (*i.e.*, without prior notice of the ADR Policy), is not sufficient to bind Stirrup. Nothing in the content of the e-mail alerted employees about implementation of the ADR Policy, which modified the conditions of their at-will employment. See *e.g. Davis*,

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755 F.3d. at 1092–93 (finding sufficient notice where a letter was sent to employees informing them about the modification and where a copy of the dispute resolution policy, including a copy of the arbitration provision, was enclosed). Moreover, in light of the steps EM took to inform employees of implementation of the ADR Policy in October 2012, EM's argument that the January 2013 e-mail constituted sufficient notice fails.

- 12 The parties do not dispute that there is no meaningful difference between California law discussed in *Davis* and Arizona law.
- 13 Stirrup also challenges the January 2013 blast e-mail referenced in Hunter's declaration. As discussed *supra* that e-mail, alone, does not constitute sufficient notice of the ADR Policy under *Davis*.
- 14 Stirrup has not pointed to binding authority supporting the conclusion that for notice to be valid in the employment context, the employee must indicate his or her acceptance of the provision. For example, in *Davis* there was no mention of any such acceptance on the employee's part. Nor was the employer required to inform the employee that continued employment constituted acceptance. *Davis*, 755 F.3d. at 1094. Stirrup cites *Nguyen v. Barnes & Noble, Inc.*, — F.3d. —, 2014 WL 4056549, which held that notice of an arbitration provision was not sufficient in the context of consumer transactions over the internet where the website did not provide notice to users of the term nor prompted users to take any affirmative action to demonstrate assent. *Nguyen* may be distinguished because it does not involve the employment context. Moreover, because EM did require the employee to indicate acceptance, whether assent is required for notice to be reasonable is not at issue here.

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2004 WL 2979960

Only the Westlaw citation is currently available.  
United States District Court,  
S.D. New York.

Darnella THOMAS, Plaintiff,

v.

BERGDORF GOODMAN, INC., William Brobston,  
Lori DeRocco, David English and Alex Yee,  
Defendants.

No. 03 Civ. 3066(SAS). | Dec. 22, 2004.

#### Attorneys and Law Firms

S. Pitkin Marshall, New York, New York, for Plaintiff.

Andrew P. Saulitis, Law Offices of Andrew P. Saulitis  
P.C., New York, New York, for Defendants.

### OPINION AND ORDER

SCHEINDLIN, J.

\*1 Darnella Thomas brings this employment discrimination action against her former employer, Bergdorf Goodman, Inc. (“Bergdorf”), and several individuals employed by Bergdorf<sup>1</sup> claiming retaliation, hostile work environment, constructive discharge, intentional infliction of emotional distress, and prima facie tort. Plaintiff brings these claims under Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e *et seq.*; the Civil Rights Act of 1866, 42 U.S.C. § 1981; the New York State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 296 *et seq.*; the New York City Human Rights Law (“NYCHRL”), N.Y.C. Admin. Code § 8–101 *et seq.*; and New York common law. Plaintiff also brings a conspiracy claim under 42 U.S.C. § 1985. Defendants now move for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). For the following reasons, defendants’ motion is granted and this case is dismissed.

#### I. FACTS<sup>2</sup>

##### A. Plaintiff’s Employment Background

Plaintiff was first hired by Bergdorf on November 27,

1995, as a temporary sales employee for the holiday season. *See* Def. 56.1 ¶ 7. She became a full-time Sales Associate in Women’s First Floor Jewelry on December 28, 1995, and was promoted to Selling Manager of that department on March 13, 2000. *See id.* ¶¶ 7–8. Upon her request, plaintiff became a Sales Associate in Bergdorf’s Fine Jewelry department as of August 1, 2000. *See id.* ¶ 9. Plaintiff was a Fine Jewelry Sales Associate from August 2000 until October 2001, when she resigned. *See id.* ¶¶ 10, 16. On January 15, 2002, plaintiff filed a dual charge with the Equal Employment Opportunity Commission (“EEOC”) and the New York State Division of Human Rights. *See id.* ¶ 115. The New York State Division of Human Rights dismissed plaintiff’s complaint on February 3, 2003, on grounds of administrative convenience. *See id.*

##### B. Excessive Monitoring and Surveillance

Plaintiff claims that beginning in October 2000, Bergdorf’s security personnel began paying extra close attention to her by closely monitoring her actions. *See* Thomas Decl. ¶¶ 4–6, 8, 10. They also made comments to plaintiff and others implying that she was dishonest and a thief. *See id.* ¶¶ 6, 7, 9. In November 2000, security officers started recounting every showcase plaintiff worked out of instead of recounting a single, randomly selected showcase. *See id.* ¶¶ 13–15. Plaintiff did not report this surveillance to anyone until early February 2001. *See* Def. 56.1 ¶ 90.

On February 6, 2001, as plaintiff was signing out of work, a newly-hired security guard named Eric Santiago approached plaintiff, pointed to the ring she was wearing, and asked her where she had gotten it because it looked just the like the one that had been stolen from Fine Jewelry. *See* Thomas Decl. ¶ 23. The next day, plaintiff relayed Santiago’s comment to DeRocco and told her that she felt that she was under suspicion by the Loss Prevention Department. *See* Def. 56.1 ¶ 92. On plaintiff’s behalf, DeRocco immediately went to David English, Director of Loss Prevention. *See id.* ¶ 93. English began to investigate the matter and, in so doing, met with Santiago. *See id.* ¶ 95. English also inquired whether anyone in the Loss Prevention Department was watching plaintiff in particular. *See id.* ¶ 96. The next day, on February 8, 2001, plaintiff met with DeRocco, Alex Yee, the Operations Manager of the Loss Prevention Department, and Thomas A. Roche, an assistant, to discuss the Santiago incident. *See id.* ¶ 97. According to plaintiff, Yee was protective of Santiago at the meeting and both Yee and Roche were dismissive and did not appear to believe plaintiff’s story.

See Pl. 56.1 ¶ 97.

\*2 On February 23, 2001, plaintiff had an encounter with a Loss Prevention investigator named Quintin Alvarez (known as "Que"). See Def. 56.1 ¶ 99. While plaintiff was photographing jewelry for a customer, Que approached her from behind and began observing her. See Thomas Decl. ¶ 27. Plaintiff told Que that she was only taking pictures. See *id.* Que responded to this statement by saying something to the effect, "Well, you must be doing something, you must be guilty of something." Def. 56.1 ¶ 99. Plaintiff proceeded to contact the Human Resources Department and spoke with her counselor, Kim Richardson. See *id.* ¶ 101. Plaintiff claims she told Richardson that she was being singled out and harassed because she is African American. See Thomas Decl. ¶ 28. On February 26, 2001, plaintiff met with Richardson who then sent English an e-mail informing him that plaintiff was very upset about the harassment from the Loss Prevention Department. See Def. 56.1 ¶ 101. A meeting was held on March 2, 2001, with plaintiff, Richardson and English. See *id.* ¶ 102. Plaintiff raised her continuing concerns including the recounting of her showcases and the Santiago incident. See Thomas Decl. ¶ 29. English told plaintiff that she was not under suspicion for anything. See Def. 56.1 ¶ 103. English then investigated the incidents and took statements from Santiago, Alvarez and Roche. See *id.* ¶ 104. English also instructed Santiago and Alvarez to avoid any interactions with plaintiff. See *id.* ¶ 105.

On March 12, 2001, plaintiff called Richardson and told her that she was still very upset at being treated like a thief. See *id.* ¶ 106. Richardson conveyed this to DeRocco as well as plaintiff's desire to meet with DeRocco. See *id.* DeRocco met with plaintiff the next day and told her that in the future she should get a third-party as a witness if security personnel followed her or made comments. See *id.* DeRocco confirmed to plaintiff that she was not a suspect and that if she thought plaintiff was stealing, she would have fired her. See *id.* ¶ 108.

The excessive surveillance continued unabated. See Thomas Decl. ¶ 33 (Yee search of plaintiff's work area), ¶ 34 (physical intimidation by a security officer), ¶ 35 (Yee's monitoring from extremely close proximity), ¶ 36 (DeRocco recounting plaintiff's Caroline Ellen showcase). On April 13, 2001, plaintiff sent a letter to Richardson, copied to DeRocco and Al Schaefer, Director of Human Resources, in which she recounted the past events and meetings. See Def. 56.1 ¶ 109. This letter never asserted that the surveillance was racially motivated. Despite Schaefer's assurance that plaintiff was not under security surveillance or under any type of

investigation, the harassment did not stop. See Thomas Decl. ¶ 42 (video surveillance by Roche), ¶ 43 (monitoring by Que), ¶ 47 (constant all day monitoring by a security guard).

\*3 On July 2, 2001, plaintiff wrote to Bill Brobston, Bergdorf's Senior Vice President and General Manager. See Thomas Decl. ¶ 46. Plaintiff met with Brobston shortly thereafter and expressed her belief that she was under surveillance. In particular, plaintiff told Brobston that no other sales associate in Fine Jewelry or any other jewelry department had been monitored the way she had been. See *id.* ¶ 50. Plaintiff also told Brobston that she was being singled out and targeted but did not tell him that she believed this action was racially motivated. See *id.* Plaintiff claims she informed Richardson and English of racial animus several months before she contacted Brobston. See *id.* On July 16, 2001, Brobston promised he would meet with plaintiff and English, as well as Schaefer, but that meeting never occurred. See *id.* ¶¶ 51, 54. Plaintiff encountered further incidents of harassment. See *id.* ¶ 53 (surveillance by a security officer while plaintiff was with a client), ¶ 61 (monitoring by a security guard), ¶ 62 (DeRocco recounting plaintiff's Donna Lewis showcase); ¶ 63 (English and three other officers staring into the Pavilion room where plaintiff was working), ¶ 64 (incident with a sign out guard), ¶ 65 (a guard commenting that he was watching plaintiff), ¶ 66 (surveillance by Roche as plaintiff checked out a gift she purchased for a customer), ¶ 67 (recounting of Angela Cummings boutique after plaintiff went there to measure pearls), ¶ 72 (observance by Yee while plaintiff was working in the Angela Cummings boutique).

### C. Plaintiff's Preliminary MAS Warning and 2001 Evaluation

#### 1. The Preliminary MAS Warning

During the time plaintiff was employed at Bergdorf, the productivity of jewelry sales associates was measured in terms of "Sales Per Hour" or "SPH." See Def. 56.1 ¶ 38. SPH is computed by dividing an associate's net sales by the number of productive hours worked for a given period, such as monthly. See *id.* The individual SPH for each sales associate is measured against the "Minimum Acceptable Standard" or "MAS" for her particular department. See *id.* ¶ 39. MAS was determined by taking the net sales for a department for the preceding month and dividing by the number of productive hours worked and then reducing that figure by fifteen percent. See *id.* ¶ 40. To review departmental productivity, the individual SPH for each sales associate was compared with the departmental MAS for the preceding month. See *id.*

If a sales associate was repeatedly deficient against the MAS, she would be given a "Preliminary MAS Warning" which contained a time frame within which to improve. *See id.* ¶ 42. An associate would be given such a warning if he or she fell below the departmental MAS for three consecutive months or in fifty percent of the preceding six month rolling period. *See id.* A Preliminary MAS Warning sets forth the actual MAS for the months involved and the associate's SPH for those months. *See id.* ¶ 45. It further states that: "You will be given \_\_\_\_ month(s) to achieve the MAS (Minimum Acceptable Standard) of productivity within your selling area. Going forward you must meet the MAS each month continuously, or you will be placed on further disciplinary action." *Id.* If an associate does not achieve the MAS within the prescribed time frame, the associate could receive a "Final MAS Warning." *See id.* ¶ 46. That warning states that failure to meet MAS will result in termination of employment. *See id.*

\*4 Although plaintiff was a productive sales associate, and met her overall goal for the fiscal year ending July 31, 2001, her productivity fell below the monthly MAS in some months. *See id.* ¶ 49. For example, in December 2000, the MAS for Fine Jewelry was \$735 while plaintiff's SPH were \$659. *See id.* ¶¶ 50–51. The MAS for Fine Jewelry in March 2001 was \$376 while plaintiff's SPH were \$166. *See id.* ¶¶ 53–54. The MAS for Fine Jewelry in April 2001 was \$359 while plaintiff's SPH were \$317. *See id.* ¶¶ 56–57. Because of these deficiencies, plaintiff was given a Preliminary MAS Warning on May 15, 2001, which gave her two months to achieve her departmental MAS. *See id.* ¶ 59.

Although plaintiff claims that DeRocco told her that she would be "out the door" if she didn't meet her goal in June or July, *see* Thomas Decl. ¶ 40, she was never placed on further disciplinary action. *See* Def. 56.1 ¶ 62. The warning itself had no adverse consequences and was not reflected in plaintiff's annual evaluation. *See id.* Furthermore, plaintiff was not the only Fine Jewelry sales associate to be given a Preliminary MAS Warning. During the same approximate time period, at least three other sales associates with SPH numbers similar to plaintiff's numbers received warnings. *See id.* ¶ 66. These other sales associates were white. *See id.*

## 2. Plaintiff's Annual Evaluation

Plaintiff was presented with her annual evaluation on August 7, 2001, which was completed by DeRocco. *See id.* ¶ 25. Plaintiff was one of the three sales associates out of a total eighteen in the Fine Jewelry department who received a raise. *See id.* ¶ 26. Plaintiff, who did not receive

a single negative rating in any of the evaluation's twenty-seven categories, received "Outstanding" and "Above Standard" in several categories. *See id.* ¶ 29. Only two other sales associates received a higher "Promotability Status" than plaintiff, who was marked "Appropriately placed." *See id.* ¶ 30.

Plaintiff's evaluation does contain a mistake. *See id.* ¶ 32. Plaintiff's SPH percentage is shown as 89%. *See id.* However, when calculated correctly, plaintiff sold at a rate of \$500 per hour which represents 149% of plaintiff's "Floor Sales Per Hour" of \$335.<sup>3</sup> *See id.* Although this error did not result in a demotion, diminution of compensation or benefits, nor any other negative consequence, *see id.* ¶ 33, plaintiff contends that she was wrongly treated as an ordinary, middle-of-the-road sales person when her sales production for a first year associate was very high. *See* Pl. 56.1 ¶ 33.

## II. LEGAL STANDARDS

### A. Summary Judgment Standard

Summary judgment is appropriate if the evidence of record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "An issue of fact is genuine 'if the evidence is such that a jury could return a verdict for the nonmoving party.'" *Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 89 (2d Cir.2004) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). "A fact is material for these purposes if it 'might affect the outcome of the suit under the governing law.'" *Id.* (quoting *Anderson*, 477 U.S. at 248).

\*5 The movant has the burden of demonstrating that no genuine issue of material fact exists. *See Powell v. National Bd. of Med. Exam'rs*, 364 F.3d 79, 84 (2d Cir.2004). In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. "To do so, the non-moving party 'must do more than simply show that there is some metaphysical doubt as to the material facts,'" *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir.2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)), and must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell*, 364 F.3d at 84 (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir.1993)). "If the evidence presented by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998) (internal quotation

marks, citations and alterations omitted). “The ‘mere existence of a scintilla of evidence supporting the non-movant’s case is also insufficient to defeat summary judgment.” *Niagara Mohawk Power Corp. v. Jones Chem., Inc.* 315 F.3d 171 (2d Cir.2003) (quoting *Anderson*, 477 U.S. at 252).

“ ‘[T]he salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to ... other areas of litigation.’ ” *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.2001) (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985)). “Courts within the Second Circuit have not hesitated to grant defendants summary judgment in such cases where ... plaintiff has offered little or no evidence of discrimination.” *Alphonse v. State of Connecticut Dep’t of Admin. Servs.*, No. Civ.3:02CV1195, 2004 WL 904076, at \*7 (D.Conn. Apr. 21, 2004) (internal quotation marks and citation omitted). Indeed, “ ‘[i]t is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases.’ ” *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir.2004) (quoting *Abdu-Brisson*, 239 F.3d at 466) (alteration in original).

However, greater caution must be exercised in granting summary judgment in employment discrimination cases where the employer’s intent is genuinely at issue and circumstantial evidence may reveal an inference of discrimination. *See Feingold*, 366 F.3d at 149. This is so because “ ‘[e]mployers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law.’ ” *Sadki v. SUNY Coll. at Brockport*, 310 F.Supp.2d 506, 515 (W.D.N.Y.2004) (quoting *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 448 (2d Cir.1999) (internal quotation marks and citation omitted, brackets in original)). But “ ‘[e]ven in the discrimination context, a plaintiff must prove more than conclusory allegations of discrimination to defeat a motion for summary judgment.’ ” *Flakowicz v. Raffi Custom Photo Lab, Inc.*, No. 02 Civ. 9558, 2004 WL 2049220, at \*8 (S.D.N.Y. Sept. 13, 2004) (quoting *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997)). “ ‘[M]ere conclusory allegations, speculation or conjecture will not avail a party resisting summary judgment.’ ” *Conroy v. New York State Dep’t of Corr. Servs.*, 333 F.3d 88, 94 (2d Cir.2003) (quoting *Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir.1996) (alteration in original)). *See also Cameron v. Community Aid for Retarded Children, Inc.*, 335 F.3d 60, 63 (2d Cir.2003) (“ ‘[P]urely conclusory allegations of discrimination, absent any concrete particulars,’ are insufficient” to satisfy an employee’s burden on a motion for summary judgment.) (quoting *Meiri*, 759 F.2d at 998)

(alteration in original).

## B. Hostile Work Environment/Constructive Discharge/Retaliation

### 1. Hostile Work Environment

\*6 To prevail on a race discrimination claim based on a hostile work environment theory, a plaintiff must show: “(1) that the workplace was permeated with discriminatory intimidation, [ridicule or insult] that was sufficiently severe or pervasive to alter the conditions of [his or] her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer.” *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221 (2d Cir.2004) (internal quotation marks and citations omitted, second alteration in original). *See also Feingold*, 366 F.3d at 149 (“In order to prevail on a hostile work environment claim, a plaintiff must first show that the harassment was sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”) (internal quotation marks and citations omitted).

A hostile work environment has both objective and subjective elements: “the misconduct must be ‘severe or pervasive enough to create an objectively hostile or abusive work environment,’ and the victim must also subjectively perceive that environment to be abusive.” *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir.2002) (quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993)). Courts must look to “the totality of the circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the victim’s ... performance.” *Hayut v. State Univ. of New York*, 352 F.3d 733, 745 (2d Cir.2003) (internal quotation marks and citations omitted).

For a hostile work environment to be actionable, there must be a link to plaintiff’s membership in a protected class. In other words, the hostile work environment must be the result of discriminatory animus. Work environments that are hostile for non-discriminatory reasons do not fall within the ambit of Title VII. *See Alfano*, 294 F.3d at 377 (“Everyone can be characterized by sex, race, ethnicity, or (real or perceived) disability; and many bosses are harsh, unjust, and rude. It is therefore important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination.”).

## 2. Constructive Discharge

Constructive discharge can be seen as an aggravated case of hostile work environment. See *Suders v. Pennsylvania State Police*, 124 S.Ct. 2342, 2355 (2004). “The same circumstances and facts that a court examines in reviewing a plaintiff’s hostile work environment claim are examined on a plaintiff’s constructive discharge claim.” *Legrand v. New York Rest. Sch./Educ. Mgmt. Corp.*, No. 02 Civ. 2249, 2004 WL 1555102, at \*8 (S.D.N.Y. July 12, 2004). However, “[a] hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign.” *Suders*, 124 S.Ct. at 2355. In other words, to establish constructive discharge, a plaintiff must show that “the abusive working environment became so intolerable that her resignation qualified as a fitting response.” *Id.* at 2347. An employee is constructively discharged when her employer, rather than terminating her, deliberately makes working conditions so intolerable that the employee is forced into involuntary resignation. See *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 161 (2d Cir.1998). Intolerable working conditions have been described as conditions “‘so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’” *Terry v. Ashcroft*, 336 F.3d 128, 152 (2d Cir.2003) (quoting *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir.1996)). Finally, in order to state a prima facie case for constructive discharge, a plaintiff must establish that the constructive discharge “‘occurred in circumstances giving rise to an inference of discrimination on the basis of her membership in [a protected] class.’” *Terry*, 336 F.3d at 152 (quoting *Chertkova*, 92 F.3d at 91) (brackets in original).

## 3. Retaliation

\*7 A plaintiff raising a claim of retaliation must first establish a prima facie case. See *Collins v. New York City Transit Auth.*, 305 F.3d 113, 118 (2d Cir.2002). To prove a claim of retaliation, a plaintiff must demonstrate that: (1) she was engaged in activity protected by Title VII, *i.e.*, complaining of discrimination; (2) the employer was aware of this activity; (3) the plaintiff suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. See *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 79 (2d Cir.2001).

An adverse employment action is defined as a “materially

adverse change” in the terms and conditions of employment. See *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir.2000); *Richardson v. New York State Dep’t of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir.1999). To be materially adverse, a change in working conditions must be “‘more disruptive than a mere inconvenience or an alteration of job responsibilities.’” *Terry*, 336 F.3d at 138 (quoting *Galabya*, 202 F.3d at 640). Examples of such a change include “‘termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices ... unique to a particular situation.’” *Id.* (quoting *Galabya*, 202 F.3d at 640).

## C. Plaintiff’s Common Law Claims

### 1. Intentional Infliction of Emotional Distress

To sustain a claim for intentional infliction of emotional distress, there must be a course of extreme and outrageous conduct exceeding “all possible bounds of decency [such that it was] atrocious and utterly intolerable in a civilized community.” *Holwell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993) (internal quotation marks and citations omitted). Determining whether the alleged conduct is sufficiently outrageous to be actionable is a question of law for the court. See *id.*

### 2. Prima Facie Tort

In order to recover for prima facie tort in New York, a plaintiff must prove: (1) the intentional infliction of harm, (2) resulting in special damages, (3) without any excuse or justification, and (4) by an act or series of acts which would otherwise be lawful. See *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142–43 (1985). In addition, the complaint must allege that defendants were motivated solely by the malicious intention to injure the plaintiff. See *Rodgers v. Grow-Kiewit Corp.*, 535 F.Supp. 814, 816 (S.D.N.Y.), *aff’d*, 714 F.2d 116 (2d Cir.1992).

## III. DISCUSSION

### A. Hostile Work Environment

Plaintiff has failed to show the required “linkage or correlation” between the race-neutral workplace incidents she alleges and any race-based discriminatory animus. Plaintiff offers only the conclusory statement that the harassment she claims to have suffered occurred because she is African American. See Thomas Decl. ¶¶ 28, 50 (“I

told [Richardson] I was sure I was being singled out and harassed because I am African American.”). This conclusory statement is not supported by any evidence. Plaintiff has offered no proof as to whether any of the other sales associates in Fine Jewelry were monitored by the Loss Prevention Department. Such evidence, if it exists, might have been discovered, for example, by reviewing complaints filed with Human Resources, but apparently this was not done. Based on the record before this Court, plaintiff has failed to adduce evidence sufficient to link the offensive acts to any race-based animus by her employer.

\*8 Plaintiff’s attempt to rely on the experiences of a co-worker, Mamadou N’Djiaie, to prove discrimination is unavailing. At his deposition, N’Djiaie testified that when he first started working in Fine Jewelry, he was singled out and watched by security. *See* Deposition of Mamadou N’Djiaie, Ex. Q to the Reply Declaration of Andrew P. Saulitis, defendants’ counsel, at 39. A security officer followed him into the street as he exited the store, stopped him, grabbed his arm, and asked to see what he was carrying in his gym bag. *See id.* at 42–43. However, N’Djiaie never attributed these incidents to any race-based discrimination. He testified as follows:

Q. When Darnella reported the incident of what Erica had said to her, did you say to her in words [of] some kind, now you know what it’s like to be a black man in America?

A. Me?

Q. Yes.

A. No.

Q. Did you ever say that to her about an incident she was reporting to you?

A. Not that I recall. Because I was not born and raised here. And when I was born, I was not raised by people calling things. I was raised as human being and respect people. I never have that thing on my mind as black, white. Or I never—I mean, I never thought anything like that.

*Id.* at 38–39.

Q. And you believe that he checked your bag because you were a black man; is that correct?

A. No, I never—I never told him. I don’t know what his motive. I never told him because I was black or white.

*Id.* at 42–43.

Plaintiff’s own Declaration is further evidence that she is merely speculating as to the reasons underlying the alleged incidents of harassment. In her Declaration, plaintiff states: “I told [Richardson] I was sure I was being singled out and harassed because I am African American.” Thomas Decl. ¶ 28. Plaintiff later states: “I became very sure from all this that Bergdorf had decided I was a thief and that since they did not dare to accuse me of that—because they had no proof—they decided to drive me out of the company.” *Id.* ¶ 69. Plaintiff has therefore offered two contradictory explanations for defendants’ behavior: (1) because she is African American, and (2) because Bergdorf thought she was a thief. Neither explanation, however, is supported by admissible evidence. “[G]eneralized speculation, conjecture, and [plaintiff’s] own opinion ... are insufficient to withstand a motion for summary judgment” in a discrimination case. *Crossland v. City of New York*, 140 F.Supp.2d 300, 307–08 (S.D.N.Y.2001) (citing *Finnegan v. Board of Educ.*, 30 F.3d 273, 274 (2d Cir.1994)). With only conclusory allegations of discrimination, plaintiff’s hostile work environment claim cannot withstand summary judgment and must be dismissed.

#### B. Constructive Discharge

Plaintiff claims that she was constructively discharged due to the combined effect of the following four interrelated factors:

(1) English accepted and supported Santiago’s explanation for her accusation of plaintiff and English untruthfully told other managers that plaintiff was not being watched and followed; (2) the harassment and accusations continued despite her complaints and request for remediation; (3) the May MAS warning and the June Evaluation indicated to plaintiff that management was critical of her performance and threatened to fire her despite plaintiff’s understanding that she had excellent sales; and (4) the requested meeting with Brobston and English (to be joined by Schaefer) originally scheduled for July 16, 2001 was postponed, ~~repromised and then never held.~~

\*9 Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment Motion at 21.

While plaintiff's resignation may have been a fitting response to this combination of events, it certainly cannot be said as a matter of law that the conditions of her employment were so intolerable that a reasonable person would have felt compelled to resign. In any event, plaintiff's constructive discharge claim fails for the same reason that doomed her hostile work environment claim—namely the failure to show that the constructive discharge occurred under circumstances giving rise to an inference of discrimination on the basis of plaintiff's race. Furthermore, plaintiff has not shown that defendants deliberately forced her to resign.<sup>3</sup>The fact that she was one of the few employees to have received a raise indicates otherwise.

### C. Retaliation

Before filing a Title VII retaliation claim in federal court, a plaintiff must first file a complaint with the EEOC. See *Criales v. American Airlines, Inc.*, 105 F.3d 93, 95 (2d Cir.1997). If the EEOC charge does not contain a retaliation claim, a plaintiff cannot thereafter raise such a claim in federal court. There is an exception, however. Where the alleged retaliation claim is "reasonably related" to the claims contained in the EEOC charge, they might be justiciable. See *Butts v. New York City Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir.1993). For example, claims of retaliation by an employer against an employee for filing an EEOC charge may be considered "reasonably related" to the underlying EEOC charge. This is not the case here. In her Charge of Discrimination, plaintiff's MAS warning is mentioned only once, as follows:

31. During this period, the company conducted monthly evaluations of employee performance in jewelry sales, a policy that subsequently was abandoned. I was given a preliminary warning in May, 2001 for not making my monthly goal in April. (Though my goal for 2000–2001 was \$800,000 in sales, I sold \$900,000 worth of jewelry during the marketing year, so my annual performance superseded my goal.)

Charge of Discrimination, Ex. C to the Declaration of Andrew P. Saulitis. The above excerpt nowhere mentions that the MAS warning plaintiff received was in retaliation for complaining about race discrimination. Nor is it reasonable to conclude that the EEOC could have made this inference based on the other allegations contained in the Charge. Therefore, plaintiff's retaliation claims are precluded as a matter of law.

Even if these claims were not precluded, they must be dismissed for two other reasons. *First*, neither the MAS warning, with the claimed threat of termination by DeRocco, nor plaintiff's evaluation represent adverse employment actions. Courts have held that negative evaluations, standing alone without any accompanying adverse results such as demotion, diminution of wages, or other tangible loss, are not cognizable. See *Valentine v. Standard & Poor's*, 50 F.Supp.2d 262, 284 (S.D.N.Y.1999) ("Given that plaintiff's negative reviews did not lead to any immediate tangible harm or consequences, they do not constitute adverse actions materially altering the conditions of [her] employment."), *aff'd*, 205 F.3d 1327 (2d Cir.2000); *Castro v. New York City Bd. of Educ. Pers.*, No. 96 Civ. 6314, 1998 WL 108004, at \*7 (S.D.N.Y. Mar. 12, 1998) ("Courts have held that negative evaluations ... that are unattended by a demotion, diminution of wages, or other tangible loss do not materially alter employment conditions."). Surely, if a negative evaluation does not constitute an adverse employment action, nor does an evaluation that is not as glowing as the employee thought it should be.

\*10 Similarly, the MAS warning plaintiff received, whether deserved or not, is not a materially adverse action. It is undisputed here that the MAS warning had no effect on plaintiff's employment status—she was not demoted, her wages were not decreased, and no further disciplinary action was taken. The mere threat of disciplinary action, including the threat of termination, does not constitute an adverse action materially altering the conditions of employment. See *Castro*, 1998 WL 108004, at \*7 ("[A]lthough reprimands and close monitoring may cause an employee embarrassment or anxiety, such intangible consequences are not materially adverse alterations of employment conditions."). Furthermore, an employer is "permitted to make bad business judgments and misjudge the work of employees as long as its evaluations and decisions are not made for prohibited discriminatory reasons such as race or gender." *Brown v. Society For Seaman's Children*, 194 F.Supp.2d 182, 191 (E.D.N.Y.2002) (internal quotation marks and citation omitted). Here, the fact that other white sales associates received similar MAS warnings during the same time period negates any inference of

discrimination. Thus, without an adverse employment action, there can be no retaliation.

Finally, even if the MAS warning and the evaluation could be considered adverse employment actions, there is no causal connection between plaintiff's protected activity and the claimed retaliatory acts. In her Declaration, plaintiff claims that in February 2001, she told Richardson that she was sure she was being singled out and harassed because she is African American. See Thomas Decl. ¶ 28. Later on, plaintiff claims that she told Richardson and English that she was being targeted because she was black months before her meeting with Brobston. See *id.* ¶ 50. Nowhere in her Declaration does plaintiff allege that she told DeRocco that she was being singled out on account of her race. See *id.* ¶¶ 24, 32, 41, 57. Nor does she allege that anyone told DeRocco that race was the motivating factor behind the harassment. Yet it was DeRocco that signed plaintiff's MAS warning and completed her evaluation. There can be no causal link without any evidence that DeRocco knew that plaintiff was claiming race discrimination.<sup>7</sup> For all of these reasons, plaintiff's retaliation claims must be dismissed.

#### D. Conspiracy/Equal Rights

##### 1. 42 U.S.C. § 1985

The four elements of a section 1985(3)<sup>8</sup> claim are: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States. See *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993) (citing *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828–29 (1983)). Furthermore, the conspiracy must also be motivated by “some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators’ action.” *Local 610*, 463 U.S. at 829.

\*11 Plaintiff's conspiracy claim fails for two reasons. *First*, there is no evidence of a conspiracy among members of Bergdorf's Loss Prevention Department. *Second*, there is no evidence that defendants' actions were motivated by racial animus or ill-will. See *Grillo v. New York City Transit Auth.*, 291 F.3d 231, 234–35 (2d Cir.2002) (“Even if Grillo's highly dubious claim that he was unfairly singled out for punishment by the instructors is credited, Grillo has ‘done little more than cite to [his alleged] mistreatment and ask the court to conclude that it

must have been related to [his] race. This is not sufficient.”’) (quoting *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 104 (2d Cir.2001)).

##### 2. 42 U.S.C. § 1981

To establish a claim under section 1981,<sup>9</sup> a plaintiff must allege the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (*i.e.*, make and enforce contracts, sue and be sued, give evidence). See *Mian*, 7 F.3d at 1087. Because plaintiff has proffered no credible evidence that defendants intentionally discriminated against her on the basis of race, her section 1981 claim must fail as a matter of law. See *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 69 (6th Cir.1985) (dismissing section 1981 claim where plaintiff failed to sufficiently proffer a prima facie case of race discrimination under Title VII).

#### E. Plaintiff's State/City Claims<sup>10</sup>

##### 1. Discrimination Claims

“Discrimination claims under the NYSHRL and the NYCHRL are analyzed using the same standards as those that apply to Title VII ... claims.” *Darrell v. Consolidated Edison Co. of New York, Inc.*, No. 01 Civ. 8130, 2004 WL 1117889, at \*10 (S.D.N.Y. May 18, 2004) (citing *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 n. 1 (2d Cir.2000)). See also *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 98 (2d Cir.2001) (“Plaintiffs’ claims’ of discrimination under the Human Rights Laws of New York City and New York State are evaluated using the same analytic framework used in Title VII actions.”). Because the hostile work environment, constructive discharge and retaliation claims brought under Title VII are hereby dismissed, so too are plaintiff's claims brought under the NYSHRL and the NYCHRL.

##### 2. Intentional Infliction of Emotional Distress

This claim can be summarily dismissed on statute of limitations grounds. The statute of limitations for intentional infliction of emotional distress is one year. See *Dreizis v. Metropolitan Opera Ass'n*, No. 01 Civ.1999, 2004 WL 736882, at \*4 (S.D.N.Y. Apr. 5, 2004) (citing N.Y. C.P.L.R. § 215(3)). This action was filed in March 2003, yet the acts complained of occurred in 2000–2001.

Accordingly, plaintiff's claim for intentional infliction of emotional distress is untimely. In addition, such claim lacks merit because defendants' conduct was not sufficiently outrageous or extreme to sustain a claim for intentional infliction of emotional distress. This claim is therefore dismissed with prejudice.

### 3. Prima Facie Tort

\*12 This claim can also be summarily dismissed as untimely. As with intentional infliction of emotional distress, the statute of limitations for prima facie tort is one year. See *Fazio Masonry, Inc. v. Barry, Bette & Led Duke, Inc.*, No. 196-01, 2004 WL 2903646, at \*2 (Sup.Ct. Albany Co. Nov. 3, 2004) ("The statute of limitation for intentional infliction of emotional distress and prima facie tort is one year."). Furthermore, plaintiff has not proved that defendants intentionally inflicted harm upon her without excuse or justification. In her Declaration, plaintiff states that the Loss Prevention Department "became very concerned about merchandise thefts, credit card scams and other losses in the fine jewelry department." Thomas Decl. ¶ 3. This statement provides an alternative explanation for the excessive monitoring and surveillance of plaintiff and thereby defeats her claim for prima facie tort, which is also dismissed with prejudice.

### E. Costs and Fees

Section 706(k) of Title VII provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). While the statute is silent as to who shall pay the fees, courts have held that the statute does not authorize an assessment of fees against the loser's attorney. See, e.g., *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 504 (3d Cir.1991). Furthermore, "[a]lthough the text of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, the Supreme Court

has held that a defendant is *not* entitled to an award of fees on the same basis as a prevailing plaintiff." *AFSCME v. County of Nassau*, 96 F.3d 644, 650 (2d Cir.1996) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-19) (1978)) (emphasis in original). With this distinction in mind, the Supreme Court held that

a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

*Christiansburg*, 434 U.S. at 421. Finally, "because fee awards are at bottom an equitable matter, ... courts should not hesitate to take the relative wealth of the parties into account." *Faraci v. Hickey-Freeman Co., Inc.*, 607 F.2d 1025, 1028 (2d Cir.1979).

Here, an assessment of fees against plaintiff is not appropriate. Crediting plaintiff's version of the story, she was subjected to a humiliating and degrading course of conduct that would have demoralized just about anyone. The fact that she was unable to ultimately prove race-based animus, which is often difficult to prove in discrimination cases, does not mean that the case was frivolous, unreasonable, or without foundation when it was first brought. I cannot know whether plaintiff or her attorney insisted on pressing this case when the lack of evidence became apparent. Without the benefit of this knowledge, I am loathe to assess fees against plaintiff, a woman of modest means, in favor of Bergdorf Goodman, a multi-million dollar department store. Accordingly, defendants' request for attorney's fees and costs is denied. See *Quiroga*, 934 F.2d at 503 ("It is clear from *Christiansburg* that attorney's fees [to defendants] are not routine, but are to be only sparingly awarded.").

### IV. CONCLUSION

\*13 For the foregoing reason, defendants' motion for summary judgment is granted. The Clerk of the Court is directed to close this motion (# 33 on the docket) and this case.

SO ORDERED:

Footnotes

- 1 The individual defendants are William Brobston, Senior Vice President and General Manager; Lori DeRocco, plaintiff's manager and supervisor at Bergdorf; David English, former Director of Loss Prevention; and Alexander Yee, a former Loss Prevention Analyst.
- 2 Unless otherwise indicated, the facts are taken from Defendants' Statement Pursuant to S.D.N.Y. Local Civil Rule 56.1 ("Def.56.1"). A number of allegations concerning the alleged discriminatory treatment suffered by plaintiff are not included in Plaintiff's Response Pursuant to Rule 56.1 ("Pl.56.1"). Rather, they are contained in the Declaration of Darnella Thomas ("Thomas Decl."), dated November 14, 2004, portions of which are recited herein to give context to plaintiff's allegations of discrimination.
- 3 The mistake was most likely the result of dividing plaintiff's SPH of \$500 by \$560, which was the Floor Sales Per Hour for many of the sales associates in the Fine Jewelry department.
- 4 In determining whether a genuine issue of material fact exists, courts must construe the evidence in the light most favorable to the non-moving party and draw all inferences in that party's favor. *See Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir.2004).
- 5 Plaintiff reads *Suders* as dispensing with the intent requirement. *Suders*, however, did not address this requirement, currently required by existing case law, but merely extended the *Ellerth/Faragher* affirmative defense to cases of constructive discharge not resulting from official action, such as a demotion or cut in pay. *See Suders*, 124 S.Ct. at 2355 ("But when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer."). The availability of the defense to the employer, however, does not negate the intent requirement on the part of a supervisor or co-worker.
- 6 The fact that other white sales associates who may have been deserving of an MAS warning but did not receive one does not alter this conclusion.
- 7 Without such knowledge on DeRocco's part, there is also no inference of discrimination. For this reason, the personnel actions taken by DeRocco cannot be seen as contributing to the hostile work environment alleged by plaintiff. Although plaintiff may have perceived DeRocco's actions as adverse, "[i]t is axiomatic that mistreatment at work ... is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic." *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir.2001).
- 8 The statute reads, in pertinent part, as follows:  
(3) Depriving persons of rights or privileges  
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.  
42 U.S.C. § 1985(3).
- 9 The statute reads, in pertinent part, as follows:  
(a) Statement of equal rights  
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.  
42 U.S.C. § 1981(a).
- 10 It is well settled that where, as here, plaintiff's federal claims were properly dismissed prior to trial, the district court has discretionary authority to dismiss the remaining state claims. *See* 28 U.S.C. § 1367(c)(3); *Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir.2001). This provides an alternative basis in which to dismiss plaintiff's state and city claims. However, I address the merits of these claims in order to dismiss them with prejudice.

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2013 WL 275018

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United States District Court, W.D. Washington,  
at Seattle.

David M. WILSON, et al., Plaintiffs,  
v.

BANK OF AMERICA, N.A., et al., Defendants.

No. C12-1532JLR. | Jan. 24, 2013.

#### Attorneys and Law Firms

David M. Wilson, Lynnwood, WA, pro se.

Cheryl M. Wilson, Lynnwood, WA, pro se.

#### ORDER ON DEFENDANTS' MOTION TO DISMISS

JAMES L. ROBART, District Judge.

#### I. INTRODUCTION

\*1 Currently before the court is Defendants Bank of America, N.A. ("BANA") and Deutsche Bank National Trust Company's ("DBNTC") motion to dismiss Plaintiffs David M. Wilson and Cheryl M. Wilson's ("the Wilsons") complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> (Mot.(Dkt. # 6).) The Wilsons oppose the motion. (Resp.(Dkt.# 10).)<sup>2</sup>

Having considered the submissions of the parties, the balance of the record, and the relevant law, and no party having requested oral argument, the court GRANTS Defendants' motion to dismiss (Dkt.# 6). The court DISMISSES the Wilsons' complaint against BANA and DBNTC WITHOUT PREJUDICE pursuant to Federal Rule of Civil Procedure 12(b) (1) because the Wilsons lack Article III standing. This court does not, therefore, have subject matter jurisdiction over their claim. The court declines granting the Wilsons leave to amend their complaint because, even if the Wilsons had standing, amendment of the complaint would be futile. The Wilsons' sole cause of action is fraud and they have pleaded themselves out of a complaint for fraud by admitting that they did not rely on the allegedly fraudulent document. Further, even if the Wilsons had

properly pleaded reliance, their theories supporting the fraud claim are not legally cognizable.

#### II. FACTUAL AND PROCEDURAL BACKGROUND

On or about February 23, 2007, the Wilsons obtained a \$216,000 mortgage loan ("the Loan") to finance the purchase of real property at 11327 30th Avenue S.E., Everett, Washington 98208 ("the Property"). (Compl.(Dkt.# 1) ¶ 1; *id.* Ex. F (Deed of Trust).)<sup>3</sup> The deed of trust securing the loan ("Deed of Trust") identifies Countrywide Bank, N.A. as the lender, Commonwealth Land Title as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, "acting solely as a nominee for Lender and Lender's successors and assigns." (*id.* Ex. F.) By a document recorded on May 11, 2012 ("Assignment"), MERS assigned its beneficial interest under the Deed of Trust, "together with the note(s) and obligations therein described," to "Deutsche Bank National Trust Company, as trustee for holders of the GSR Mortgage Loan Trust 2006-OA1." (*id.* Ex. G (Assignment of Deed of Trust).) BANA began servicing the loan in May 2009. (*id.* ¶ 4.)

The Wilsons defaulted on the Loan in October 2011. (*See id.* ¶ 5) Although the Wilsons allege that BANA recorded the Assignment "in an attempt to illegally move forward with foreclosing on Plaintiffs [sic] property," (*id.* ¶ 8), the Wilsons' complaint does not allege BANA or any other entity has taken steps to foreclose on the Property, such as by serving a notice of default on the Wilsons. (*See generally id.*)

On November 30, 2011, the Wilsons filed a lawsuit against "Bank of America NA Trust GSR2007-OA1" in Snohomish County Superior Court. (McCormick Decl. (Dkt. # 7) Ex. B. (Compl.)) BANA removed the case to the Western District of Washington. *Wilson v. Bank of America N.A. Trust GSR2007-OA1*, No. C-11-2146MJP (W.D. Wash March 16, 2007) ("*Wilson I*"). The Wilsons' complaint in that case contained substantially similar allegations to those in the instant complaint:

\*2 • That the Wilsons made numerous requests to BANA asking that BANA identify the investor(s) of the Loan and that BANA responded on three separate occasions, each time identifying a different investor. (McCormick Decl. at 15 (Ex. B); Compl. ¶ 6.)

- That the “Pooling and Servicing Agreement” for “Trust GSR2007–OA1” required that all mortgage notes be placed in the trust “within a specific time frame,” or by a “cut-off date.” (McCormick Decl. at 16 (Ex. B); Compl. ¶ 8–c–2.)
- That BANA intentionally failed to disclose to the Wilsons the identity of the holder of the Loan’s promissory note. (McCormick Decl. at 18 (Ex. B); Compl. ¶ 9.)
- That BANA does not know who the Loan’s “Holder in Due Course” is and that, therefore, the mortgage is “unsecured and no longer negotiable.” (McCormick Decl. at 18–19 (Ex. B); Compl. ¶¶ 11, 13.)

In addition to a claim for quiet title, the Wilsons alleged that BANA violated its duty of good faith and fair dealing. (McCormick Decl. at 18–19 (Ex. B).)

On March 16, 2012, the court in *Wilson I* issued an order dismissing the Wilsons’ claims without prejudice. (*Id.* at 10 (Ex. A).) The court dismissed the Wilsons’ quiet title claim because they failed to allege they had paid off the Loan or that BANA made any claim to the Property. (*Id.* at 8.) The court dismissed the Wilsons’ breach of duty of good faith claim because BANA had no duty to produce the Loan’s promissory note upon the Wilsons’ demand. (*Id.* at 10.) Finally, the court rejected the Wilsons’ attempted RESPA claim because they first raised it in their response to BANA’s motion to dismiss, rather than in their complaint. (*Id.* at 10.)

The Wilsons filed the instant “COMPLAINT FOR FRAUD” on September 20, 2012. (Compl. at 1.) In addition to re-stating many of the factual allegations made in the prior suit, the Wilsons assert a fraud claim. (*Id.* ¶¶ 9, 11.) The Wilsons allege that BANA and DBNTC conspired to fraudulently execute and record the Assignment from MERS to DBNTC in order to “cause Plaintiffs to relinquish the property to the Defendants under false pretenses.” (*Id.* ¶ 11.)

### III. DISCUSSION

Even liberally construed,<sup>4</sup> the Wilsons’ complaint does not plainly state their claims. Fed.R.Civ.P. 8(a)(2). The court concludes that the complaint asserts only a cause of action for fraud.<sup>5</sup> The complaint contains numerous legal conclusions among its factual allegations and does not specifically name any other causes of action, nor can the

court discern any other causes of action. The Wilsons’ claim for fraud is premised on the following allegations:

1. That Defendants conspired to fraudulently assign the Deed of Trust to DBNTC so that DBNTC could “gain an unfair advantage” with the Wilsons in negotiations over the Loan, in an attempt to force the Wilsons to “relinquish the property to Defendants under false pretenses.”<sup>6</sup> (Compl.¶¶ 9, 11.)

\*3 2. That Defendants improperly transferred the Deed of Trust separate from the Loan’s promissory note. (*Id.* ¶ 8–a.)

3. That MERS lacked authority to transfer the Deed of Trust to DBNTC. (*Id.* ¶ 8–e.)

4. That Defendants lack clear title and are not “holders in due course” of the Loan. (*Id.* ¶¶ 8–c, 8–d, 13.)

The Wilsons’ also attempt to raise an additional claim in their response to Defendants’ motion to dismiss:

5. That Defendants failed to send required disclosures to the Wilsons after acquiring the loan, in violation of Regulation K, 12 C.F.R. § 226.39 and the Truth in Lending Act (“TILA”), 15 U.S.C. § 1641(g). (Resp. at 3.)

Defendants argue that all of the claims are barred by the doctrine of *res judicata*; that the Wilsons inadequately plead fraud as a matter of law; and that MERS’s assignment of the Deed of Trust was not, in fact, fraudulent as a matter of law. (Mot. at 2.) Defendants argue that any amendment to the complaint would be futile and ask the court to dismiss the Wilsons’ complaint in its entirety. (Mot. at 6.)

#### A. Article III Standing

The court DISMISSES the Wilsons’ claims WITHOUT PREJUDICE on grounds that they lack Article III standing. Defendants did not raise the issue. (*See generally* Mot.) Although not raised by the parties, the court must consider standing *sua sponte*.<sup>7</sup> *See Columbia Basin Apartments Ass’n v. City of Pasco*, 268 F.3d 791, 796 (9th Cir.2001) (stating that courts are “obliged” to consider standing *sua sponte* as a matter of Art. III’s case-or-controversy requirement); *see also City of L.A. v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (“[T]hose who seek to invoke the jurisdiction of

the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy). If the Wilsons lack Article III standing, then this court lacks subject matter jurisdiction over their claims. *Braunstein v. Ariz. Dept. of Transp.*, 683 F.3d 1177, 1184 (9th Cir.2012).

The court analyzes dismissal for lack of standing under Federal Rule of Civil Procedure 12(b)(1). *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir.2011). Under Rule 12(b)(1), the court must accept all material allegations in the complaint and must construe the complaint in favor of the Wilsons. *Id.* at 1068. While “general factual allegations of injury resulting from the defendant’s conduct may suffice,” a plaintiff cannot rely on “bare legal conclusions to assert injury-in-fact.” *Id.* at 1068–69 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351(1992)).

To demonstrate standing to sue in federal court, a plaintiff must show (1) that he or she has suffered an injury in fact; (2) that the injury is traceable to the conduct complained of; and (3) a likelihood that the injury would be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61 (1992). The burden of establishing standing, which rests on the party invoking federal court jurisdiction, varies depending upon the stage at which standing becomes an issue. *Id.* at 561. At the pleading stage, the court looks only to the sufficiency of the allegations in the pleadings. *Id.*

\*4 The Wilsons have not alleged imminent injury and therefore lack standing. (Compl.¶ 14). The Wilsons allege that they face the “threatened loss of their home,” but they have not pled sufficient facts demonstrating that any of the named defendants have begun or even threatened foreclosure proceedings. The Wilsons have not alleged that any defendant sent a notice of foreclosure or appointed a trustee to initiate non judicial foreclosure of their Property; which particular defendant (if any) sent the notice; when the notice of foreclosure (if any) was sent; when an alleged foreclosure sale (if any) is scheduled to occur; or if any defendant has actually foreclosed on the Loan. *Cf. Tully v. Bank of Am.*, No. 10–4734, 2011 WL 1882665, at \*5 (D.Minn. May 17, 2011) (dismissing complaint for lack of Article III standing where plaintiffs alleged defendants issued notices of foreclosure, but did not allege when the notices were published, whether foreclosure sales were scheduled to occur, or whether defendants had already foreclosed homes); *see also Bisson v. Bank of Am., N.A.*, No. 12–cv–0095JLR (W.D.Wash. Jan. 15, 2013) (dismissing claims for lack of standing where plaintiffs did not allege they were currently subject to foreclosure proceedings).

The Wilsons allege Defendants committed fraud “in an attempt to illegally move forward with foreclosing on Plaintiffs [sic] property .” (Compl.¶ 8.) Even drawing all inferences in favor of the Wilsons, this bare assertion implies only that one of the three named defendants *might* go forward with foreclosure. The Wilsons’ injuries are thus speculative. *See Lujan*, 504 U.S. at 560 (stating that injuries cannot be “hypothetical” or “conjectural”). The Wilsons’ other claims of injury—the “threatened” loss of their loan payments to-date and the “threat” of damage to their credit report—are consequences of the “threatened” foreclosure and are therefore part of the same speculative injury. Without pleading any facts suggesting that these “threats” are likely to occur, the Wilsons’ allegations do not rise to the level of an actual or imminent injury.

Because the Wilsons’ threadbare allegations of injury do not amount to injury-in-fact, the court DISMISSES the Wilsons’ complaint WITHOUT PREJUDICE for lack of Article III standing, pursuant to Federal Rule of Civil Procedure 12(b)(1).

Normally, “[a] *pro se* litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.” *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987). Here, however, the Wilsons’ amendment of their complaint would be futile. *Mirmehdi v. United States*, 689 F.3d 975, 985 (9th Cir.2012) (“[A] party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile.”) Even if the Wilsons properly amend their complaint to plead Article III standing, the Wilsons’ complaint nevertheless fails to state a claim for fraud and any amendment of their fraud claim would be futile. Because the Wilsons claim for fraud fails on other grounds, granting leave to amend for purposes of properly alleging Article III standing would be futile.

#### **B. Futility of Amendment**

\*5 Even if the Wilsons amended their complaint to properly plead Article III standing, they cannot allege a fraud claim as a matter of law. For the reasons discussed below, the court finds that any amendment of the complaint re-stating the fraud claim would be futile. The Wilsons allege that they do not believe the Assignment is valid and have taken no actions in reliance on it to their detriment. Further, the Wilsons’ theories as to why the Assignment is fraudulent are not themselves causes of action and fail to establish fraud as a matter of law.

### 1. Sufficiency of the Wilsons' Fraud Pleading

A plaintiff claiming fraud must plead the circumstances constituting fraud with particularity. Fed.R.Civ.P. 9(b). A pleading is sufficient under Federal Rule of Civil Procedure Rule 9(b) only if it “[identifies] the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.” *Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir.1973). This requires that a false statement must be alleged, and that “circumstances indicating falseness” must be set forth. *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994). Thus, Rule 9(b) requires a plaintiff to “identify the ‘who, what, when, where and how of the misconduct charged,’ as well as ‘what is false or misleading about [the purportedly fraudulent conduct], and why it is false.” *Cafasso, ex rel. United States v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir.2011) (quoting *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.2010)).

Courts hold allegations of *pro se* litigants to “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Nevertheless, Rule 9(b) applies with equal strength to defendants sued by *pro se* litigants. *Ready v. Nuance Commc'ns, Inc.*, No. 11–CV–05632, 2012 WL 692414, at \*3 (N.D.Cal. Mar. 2, 2012) (citing *Kelley v. Rambus, Inc.*, 384 Fed. Appx. 570, 573 (9th Cir.2010) (unpublished)).

The Wilsons have not pleaded the circumstances of Defendants' allegedly fraudulent actions with the required particularity. In Washington, fraud requires that the plaintiff prove: (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage. *Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wash.2d 157, 273 P.3d 965, 970 (Wash.2012).

The Wilsons do not allege with any particularity what the nature of the alleged fraud is. The complaint contains a myriad of conclusory accusations and unsupported legal conclusions: that Defendants colluded to undermine the chain of title, that Defendants knew securitization of the Loan would not result in a clear chain of title, that MERS lacked authority to transfer the Deed of Trust, and that “[a] Deed of Trust has no assignable quality independent of the debt.” (Compl.¶¶ 8–a, 8–e, 9, 10.) Added up, the string of unsupported allegations do not specify the “who, what, when, where and how” of the supposed fraud.

\*6 But even if the Wilsons had properly pleaded that Defendants knowingly made a false misrepresentation in the Assignment, they cannot, as a matter of law, show they relied on Defendants' representations to their detriment. The Wilsons fail to allege in their pleadings that they took any actions in reliance on the allegedly fraudulent Assignment. The Wilsons allege that Defendants executed the Assignment with the “intent to” induce their reliance on it (*see id.* ¶ 11, 273 P.3d 965), but they fail to allege any actual detrimental reliance. The Wilsons might have been entitled to leave to amend for purposes of alleging this element, if appropriate, were it not for their representation to the contrary in their response memorandum. In their response, the Wilsons explain that “[h]ad Plaintiffs not diligently researched and educated themselves regarding securitization and the specifics of ... their loan, Plaintiffs would be relying on the information Defendants have provided in the [Assignment].” (Resp. at 5.) The Wilsons cannot demonstrate the required elements of ignorance of falsity or reliance when they explicitly admit they did not rely on the allegedly fraudulent Assignment. “The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.” Restatement (Second) of Torts § 541 (1965).

Further, the Wilsons cannot show that the purported fraudulent Assignment was the proximate cause of their alleged damages. *See Turner v. Enders*, 15 Wash.App. 875, 552 P.2d 694, 697 (Wash.Ct.App.1976) (holding that damages for fraud are measured by all losses proximately caused by the fraud). The Wilsons do not allege that they would have taken any alternate course of action but for Defendants' alleged fraud. As with reliance, the Wilsons admit that the allegedly fraudulent Assignment did not cause them damages. They state that Defendants “hoped to” take their home away using the Assignment, but that the Wilsons knew the Assignment to be a fraud, so they refused to give up their home to BANA. (Resp. at 6.)

Finally, the Wilsons claim that they face damages including the “threatened loss of their home,” the loss of equity in their home, and potential damage to their credit report. (Comp ¶ 14.) But the Wilsons allege no facts demonstrating how these damages flow from Defendants' alleged misrepresentation. They do not allege the Assignment caused them to enter into the Loan, nor do they allege it caused them to default on the loan. To the extent the Wilsons are faced with the threat of foreclosure, that threat results from their own default, not from the alleged misrepresentation. Further, the Wilsons fail to allege BANA or DBNTC has attempted to

foreclose or that foreclosure is imminent. (*Id.*)

For all of the reasons above, the Wilsons have failed to plead fraud. Thus, even if the Wilsons had standing, the court would dismiss their complaint. Ordinarily, on a motion to dismiss, the court should liberally grant leave to amend. Fed.R.Civ.P. 15(a) (2); *Mirmehdi*, 689 F.3d at 985. When amendment would be futile, however, the court need not grant leave to amend. *Mirmehdi*, 689 F.3d at 985. Here, amendment of the complaint would be futile. The Wilsons cannot plead reliance, a required element of their fraud claim, after they have admitted in their response memorandum that they have not detrimentally relied upon Defendants' allegedly fraudulent document. The court exercises its discretion to treat this statement as a judicial admission. *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 557 (9th Cir.2003) (holding courts "have discretion to consider a statement made in briefs to be a judicial admission ... binding on ... the trial court.") (internal citations omitted); see also *Cook v. Reinke*, 484 Fed. Appx. 110, 112 (9th Cir.2012) (unpublished) (holding that court could construe defendant's admission in his memorandum to motion to dismiss as a binding judicial admission); *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir.1994) ("A court can appropriately treat statements in briefs as binding judicial admissions of fact."). The Wilsons have argued themselves out of court by asserting facts demonstrating they have no fraud claim. *Jackson v. Marion Cnty.*, 66 F.3d 151, 153 (7th Cir.1995) ("[A] plaintiff can plead himself out of court by alleging facts which show that he has no claim.")

## 2. Authorization of MERS to Assign the Deed of Trust to DBNTC

\*7 Even if the Wilsons had properly pleaded the reliance and proximate cause elements of fraud, none of their theories supporting why the Assignment is fraudulent are legally cognizable. The Wilsons have not pleaded their theories with particularity, but to the extent the court can discern what they are, the Wilsons appear to advance three theories regarding the Defendants' fraud.<sup>8</sup> The Wilsons' theories, discussed in detail below, are not themselves causes of action. Cf. *Burkhart v. Mortg. Electronic Registrations Sys., Inc.*, No. C11-1921RAJ, 2012 WL 4479577, at \*5 (W.D.Wash. Sept.28, 2012) (holding that plaintiff's claims that the deed of trust was not valid security for the note and that the deed of trust was inconsistent with the Deed of Trust Act were "legal conclusions," not grounds for relief from the court). Additionally, for the reasons discussed below, the court agrees with Defendants that the Wilsons' theories cannot support a fraud claim as a matter of law. For this reason,

as well as because the Wilsons have pleaded themselves out of a fraud claim by alleging a lack of reliance, the court finds that any amendment of the complaint would be futile.

### a. Separation of the Promissory Note from the Deed of Trust

Defendants argue that the Wilsons' contention that the Deed of Trust cannot be assigned independent of the note fails as a matter of law. (Mot. at 9.) The Wilsons' claim that a Deed of Trust separated from the note cannot be assigned is a legal conclusion, not a cause of action, and the Wilsons' offer no authority to support it. (Compl. ¶ 8-a.) It is not a violation of Washington law to split the note from the deed. *Zamzow v. Homeward Residential, Inc.*, No. C12-5755BHS, 2012 WL 6615931, at \*1 (W.D.Wash. Dec.19, 2012) (citing *Bain v. Metro. Mortgage Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34, 48-49 (Wash.2012)). Further, the Wilsons did not clearly plead that the note for their loan was at any point actually separated from the Deed of Trust. (See generally Compl.) Even if they had, the Assignment itself states that DBNTC assumed all beneficial interest in the Deed of Trust "together with the note(s) and obligations therein described." (*Id.* Ex. G.) As such, the inference from the complaint is that either ownership of the note was never separated from the Deed of Trust or, if it was, ownership is now united.

Even if ownership of the Deed of Trust is split from the note, the split only renders the Deed of Trust unenforceable if the trustee initiating foreclosure is not an agent of the lender. See *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir.2011). The Wilsons have not alleged that any party has initiated foreclosure proceedings, or that they have been injured in any way by the alleged split. See *id.* at 1042. Further, the Wilsons cite no support for the proposition that separation of the note from the Deed of Trust renders the note itself unenforceable or excuses them from paying on the note. See *In re Reinke*, Bankruptcy No. 09-19609, 2011 WL 5079561, at \*7 (W.D.Wash. Oct. 26, 2011) ("[T]he role of MERS as nominee under a deed of trust does not irreparably split the note from the deed of trust so as to render the note unsecured. In addition, the Court finds no statutory or common law in the State of Washington to suggest otherwise and none has been cited by Plaintiff.").

### b. Authority of MERS to Assign the Deed of Trust

\*8 The Wilsons assert that MERS lacked authority to transfer the Deed of Trust to DBNTC because MERS is

the nominee of “an unknown lender.” (Compl. ¶ 8–e.) Defendants argue that the Wilsons’ contention is “non-sensical” because MERS had authority to transfer as nominee of Countrywide. (Mot. at 9.) Defendants misinterpret the Wilsons’ argument. The Wilsons appear to be arguing that BANA did not know who owned the loan *at the time* MERS affected the transfer because by that time, Countrywide had ceased to exist and BANA had already securitized the loan. (See generally Compl. ¶ 8.) The Wilsons seem to be asserting either that MERS did not know who they were acting on behalf of, or that MERS was a sham beneficiary. (*Id.* ¶ 8–e.)

Either way, the Wilsons’ argument is not relevant. “Even if MERS were a sham beneficiary, [the Wilsons’ lender] would still be entitled to repayment of the loans and would be [a] proper part[y] to initiate foreclosure after the plaintiffs defaulted on their loans.” *Cervantes*, 656 F.3d at 1044.<sup>9</sup> The Wilsons do not explain how they relied on MERS’s transfer to DBNTC to their detriment, nor do they plead any facts demonstrating that either BANA or DBNTC knew the transfer was invalid.<sup>10</sup> *Cf. Burkart*, 2012 WL 4479577, at \*6 (dismissing similar claims).

### c. Clear Title to the Loan

The Wilsons argue that BANA’s assignment of the Loan to certain trusts violated those trusts’ Pooling and Servicing Agreements, and/or exposed BANA to a tax penalty, and therefore, BANA must not have actually placed the Loan into the trusts. (Compl. ¶ 8–c.) The Defendants argue that the Wilsons lack standing to allege a violation concerning the actions of third parties and that the Wilsons’ allegations do not show the Assignment was invalid. (Mot. at 11.) The Wilsons do not cite any authority for the proposition that Defendants were required to inform the Wilsons of their compliance with the Pooling and Servicing Agreement, nor do they explain

why Defendants should have the burden of proving they correctly assigned the Loan. See *Mikhay v. Bank of Am.*, 2:20–cv–01464RAJ, 2011 WL 167064, at \*2 (W.D.Wash. Jan. 12, 2011) (“Plaintiffs do not cite any obligation on [defendant] to inform Plaintiffs of its compliance with [the terms of a trust agreement] or explain why the burden ... should be on [the defendant] to prove the propriety of its conduct.”). Defendants are correct that the Wilsons lack standing to enforce the terms of a pooling and service agreement to which they are not a party. See *Brodie v. Nw. Trustee Srvs., Inc.*, No. 12–0469TOR, 2012 WL 4468491, at \*4 (E.D.Wash. Sept. 27, 2012) (collecting cases). Further, the Wilsons cite no authority supporting their contention that BANA improperly securitized the Loan, nor do they suggest any injury resulting from the securitization of their loan. *Id.*

The Wilsons’ argument that BANA somehow improperly securitized the Loan is irrelevant. “Securitization merely creates a separate contract, distinct from the Plaintiffs’ debt obligations under the Note, and does not change the relationship of the parties in any way.” *Bhatti v. Guild Mortg. Co.*, No. C11–0480JLR, 2011 WL 6300229, at \*5 (W.D.Wash. Decl. 16, 2011).<sup>11</sup>

## IV. CONCLUSION

\*9 For the foregoing reasons, the court GRANTS Defendants’ motion (Dkt. # 6.) and DISMISSES the complaint WITHOUT PREJUDICE.

Dated this 23rd day of January, 2013.

### Footnotes

<sup>1</sup> The Wilsons named “Deutsche Bank National Trust Company TRUST GSR2007–OA1” as defendant. (Compl.(Dkt.# 1) at 1.) BANA and DBNTC’s motion instead names “Deutsche Bank National Trust Company, As Trustee for the Holders of GRS Mortgage Loan Trust 2006–OA1” as defendant. (Mot.(Dkt.# 6) at 1.) BANA and DBNTC assert that the Wilsons incorrectly named the proper DBNTC defendant. (Reply (Dkt.# 11) at 2.) The record itself is contradictory. The Assignment of Deed of Trust states that MERS assigned all beneficial interest in the Deed of Trust to “Deutsche Bank National Trust Company, As Trustee for the Holders of GRS Mortgage Loan Trust 2006–OA1.” (Compl. Ex. G (Assignment of Deed of Trust).) The Assignment of Deed of Trust is dated May 11, 2012. Cheryl Wilsons’ Declaration, however, contains a letter from BANA to the Wilsons, dated July 3, 2012, stating that their loan’s investor is “Deutsche Bank National Trust Company, As Trustee for the Holders of GRS Mortgage Loan Trust 2007–OA1.” (Wilson Decl. (Dkt.# 10–1) Ex. A.) The court need not rule on whether the 2006 or 2007 Trust is the proper defendant, as the issue does not change the outcome of the motion.

<sup>2</sup> The Wilsons also named Wells Fargo, N.A. as a defendant. Wells Fargo, N.A. did not join BANA and DBNTC’s motion. (Mot. at 1). Accordingly, “Defendants,” where used in this order, refers only to BANA and DBNTC.

- 3 In evaluating a motion to dismiss, the court may consider any exhibits attached to the complaint. *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.2012). The Wilsons attached the Deed of Trust and Assignment to their complaint. (Compl.Ex.F, Ex. G.)
- 4 Because the Wilsons are proceeding *pro se*, the court liberally construes their pleadings. See *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.1987).
- 5 The complaint is captioned “COMPLAINT FOR FRAUD.” (Compl. at 1)
- 6 The Wilsons do not allege that they actually relinquished their home to Defendants; rather, they face the “threatened loss of their home.” (Compl.¶ 14.)
- 7 The court need not notify the parties of its intent to dismiss for lack of subject matter jurisdiction. “While a party is entitled to notice and an opportunity to respond when a court [*sua sponte*] contemplates dismissing a claim on the merits ... it is not so when the dismissal is for lack of subject matter jurisdiction.” *Scholastic Entm’t, Inc. v. Fox Entm’t Group, Inc.*, 336 F.3d 982, 985 (9th Cir.2003) (internal citations omitted) (upholding district court’s *sua sponte* dismissal of plaintiff’s complaint without notice where court lacked jurisdiction based on amount-in-controversy requirement). Further, a court is not required to give a plaintiff notice of *sua sponte* dismissal, even on the merits, if the amendment of the claim would be futile. See *Omar v. Lea-Lane Serv., Inc.*, 813 F.2d 986, 991 (9th Cir.1987) (“A trial court may dismiss a claim *sua sponte* under [Rule] 12(b)(6). Such a dismissal may be made without notice where the claimant cannot possibly win relief.”). Here, notifying the Wilsons that the court dismisses their complaint based on their lack of standing would be unnecessary because, even if the Wilsons amend their complaint to properly plead standing, any amendment of their fraud claim would be futile. See *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 335–36 (5th Cir.2002) (Benavides, J., specially concurring) (reasoning that potential prejudice from lack of notice of *sua sponte* dismissal was “*de minimis*” where plaintiffs’ response to notice would be futile).
- 8 In their response brief, the Wilsons also allege that they have never received notice of any successive transfers of the Loan, in violation of “FDIC 226.39.” (Resp. at 3.) Liberally construed, the Wilsons appear to be alleging that Defendants violated Regulation K, 12 C.F.R. § 226.39 (2012) (promulgated under TILA, 15 U.S.C. § 1601 et seq. (2006)). That regulation states that an entity that acquires an existing mortgage loan by obtaining legal title to the debt obligation must make certain disclosures to the borrower within thirty days of acquiring the loan. See 12 C.F.R. § 226.39 (2012). Defendants correctly note that the Wilsons failed to state this claim in their Complaint. (Reply (Dkt.# 11) at 5.) The court thus declines to consider this claim. See *Schneider v. Dep’t of Corrections*, 151 F.3d 1194, 1197 n. 1 (9th Cir.1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a motion to dismiss.”) (emphasis in original).
- 9 The Washington Supreme Court recently held that MERS is not a lawful beneficiary under Washington’s Deed of Trust Act, unless MERS holds the note underlying a Deed of Trust. See *Bain v. Metro. Mortgage Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34, 36–37 (Wash.2012). The *Bain* Court, however, “did not determine the legal effect of a deed of trust that unlawfully purported to name MERS as its beneficiary.” *Burkart*, 2012 WL 4479577 at \*4. The *Bain* Court did hold that characterizing MERS as the beneficiary is “potentially” an “unfair or deceptive act or practice” under the Washington Consumer Protection Act, but also emphasized that “a borrower may or may not be injured by the disposition of the note ... and MERS may or may not have a causal role.” *Bain*, 285 P.3d at 50–51. The *Bain* Court did not state, as the Wilsons allege here, that MERS is incapable of transferring its interest in a deed of trust and the Wilsons cite no authority for that proposition. See generally *id.* at 49. The only post-*Bain* Washington decision does not address the issue. See *Peterson v. Citibank, N.A.*, No. 67177–4–I, 2012 WL 4055809, at \*4 (Wash.Ct.App. Sept.17, 2012) (unpublished) (upholding dismissal of plaintiff’s Consumer Protection Act claim for failure to allege injury resulting from assignment of MERS as beneficiary). The *Bain* Court stated that it “tended to agree,” though did not formally decide, that MERS’s violation of the Deed of Trust Act “should not result in a void deed of trust.” *Id.* The Wilsons have not pleaded a Consumer Protect Act claim, nor have they pleaded any facts that would demonstrate a cognizable injury traceable to Countrywide’s naming of MERS as a beneficiary. (See generally Compl.) The Wilsons, rather, make the conclusory allegation that MERS did not have the authority to transfer the Deed of Trust to DBNTC because of their unsupported legal conclusion that “[a] nominee of the owner of the note and mortgage may not effectively assign the note to another for want of an ownership interest in said note by nominee.” (Compl.¶ 8–e.) Even liberally construed, such conclusory allegations do not form any recognizable cause of action nor give the court a basis for determining if the *Bain* decision has any relevance to the Wilsons’ claims.
- 10 The Wilsons’ allegations that Defendants’ actions were “deliberate” and that they “knowingly” undermined the chain of title are conclusory allegations unsupported by any pleaded facts. (See Compl. ¶¶ 9, 12.)
- 11 Defendants also argue that the Wilsons’ claims are barred by the doctrine of *res judicata* because their complaint raises the same issues, arising from the same transaction, raised in *Wilson I*. *Res judicata* “requires a final judgment on the merits” in a previous action. *Pederson v. Potter*, 103 Wash.App. 62, 11 P.3d 833, 835 (Wash.Ct.App.2000). Here, the United States District Court for the Western District of Washington dismissed *Wilson I* without prejudice for failure to state a claim. (McCormick Decl. at 10.)

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*Wilson I* was not a “final judgment on the merits” for *res judicata* purposes under Washington law and, therefore, *res judicata* is inapplicable. See *Russell v. Leslie*, 142 Wash. 60, 252 P. 151, 152 (Wash.1927) (rejecting argument that *res judicata* applied where court in first suit dismissed action without prejudice); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (“[D]ismissal ... without prejudice is a dismissal that does not operat[e] as an adjudication upon the merits ... and thus does not have a *res judicata* effect.”) (internal quotations omitted).

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