Case No. 14-17344

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAMSES GUTIERREZ, et al.,
individually and on behalf of all others similarly situated

Plaintiffs and Appellees,

vs.

CARTER BROTHERS SECURITY SERVICES, LLC, a Florida limited liability company;

Defendant and Appellant.

On Appeal from the United States District Court
For the Eastern District of California
Honorable Morrison C. England, Jr.
Case No. 2:14-cv-00351-MCE-CKD

APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

(1) Pursuant to FRAP 26.1, the undersigned Counsel of Record for the Appellant to this action certifies the following is a full and complete list of any parent corporation and any publicly held corporation that owns 10% or more of its stock:

For the Appellant: None

Respectfully submitted this the 29th day of June, 2015.

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JURISDICTIONAL STATEMENT

The Ninth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 9 U.S.C. § 16(a)(1)(B) to review the district court's denial of Appellant's Motion to Compel Arbitration. The Ninth Circuit Court of Appeals also has jurisdiction over this appeal pursuant to 28 U.S.C. § 1294 because this Circuit includes the Eastern District of California.

This appeal is from an Order denying Appellant's Motion to Compel Arbitration and Dismiss Proceedings and Motion to Transfer Venue. The district court entered this Order on October 30, 2014. Appellant filed its Notice of Appeal on November 24, 2014, within the 30 day time period allotted by Federal Rules of Appellate Procedure Rule 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the district court erred by failing to compel arbitration consistent with the parties' Agreement where the arbitration clause is clear and imposes bilateral obligations on the parties.

2. Whether the district court erred in failing to sever provisions in the arbitration clause it found to be objectionable.

3. Whether the district court erred in ruling that the entire Agreement between the parties is void for illegality in light of the Agreement's arbitration clause.

4. Whether the district court erred in denying Appellant's Motion to Transfer Venue to the Northern District of Georgia where the forum selection clause in the Agreement is mandatory, reasonable, and valid.

STATEMENT OF THE CASE

This lawsuit arises out of work Appellees performed as independent contractors of Appellant Carter Brothers Security Services, LLC ("Carter Brothers"). In 2012, Carter Brothers entered a contract with AT&T Digital Life, Inc.[1] that required Carter Brothers to provide technicians for the installation of security systems. (2 ER 130)[2]. Carter Brothers hired Appellees as independent contractors to install security systems provided by AT&T Digital life, Inc. (2 ER 130).

Each Appellee signed an Independent Contractor Agreement (the "Agreement"), which contains an arbitration clause. (*See* 2 ER 130; *see also* 2 ER 124-125). The Agreement also contains a forum selection clause, designating Fulton County Georgia as the agreed upon venue for any disputes arising out of the Agreement. (2 ER 125). Notwithstanding these provisions, Appellees filed suit in the Eastern District of California.

Appellees asserted numerous causes of action against Carter Brothers arising out of their employment with Appellant. (*See* 2 ER 155-189) ("First Amended Complaint"). In particular, the First Amended Complaint requests "injunctive and

[1] AT&T Digital Life, Inc. is a co-defendant at the district court level but is not a party to this appeal.

[2] "ER" refers to the Excerpts of the Record on appeal.

declaratory relief including rescission of the so-called 'Independent Contractor Agreements' with the Defendant Employers. . . ." (2 ER 156-157, 183-184).

Carter Brothers moved the district court to compel arbitration consistent with the plain language of the Agreement ("Motion to Compel Arbitration") or, alternatively, to transfer venue to the Northern District of Georgia pursuant to the forum selection clause in the Agreement ("Motion to Transfer Venue"). (2 ER 131-154).

The district court erroneously held that the Agreements are contracts of adhesion, procedurally unconscionable, and substantively unconscionable. (1 ER 6, 8-10). The court also erroneously held that the arbitration provision, non-competition clauses, and governing law provisions in the Agreements are one-sided, and therefore substantively unconscionable under California law. (1 ER 9-10). The district court further held that the contract as a whole is "an apparent attempt by Carter Brothers to avoid paying employment taxes and other benefits that would, in turn, give it a competitive edge over employers who properly paid applicable taxes and benefits. In that regard, then, the Agreements have an 'unlawful purpose.'" (1 ER 10). Finally, because the district court found the Agreements to be unconscionable and unenforceable, without considering the Agreement's severance clause, it also summarily denied as moot Carter Brothers' Motion to Transfer Venue. (1 ER 11). This appeal followed.

SUMMARY OF THE ARGUMENT

The district court erred in denying Appellant's Motion to Compel Arbitration. As an initial matter, the district court should have limited its inquiry to the arbitration clause itself; instead, it considered provisions unrelated to the arbitration clause when it found the Agreement to be unconscionable. Similarly, the court erred by finding the Agreement as a whole is illegal. The validity of an Agreement as a whole, which contains an arbitration clause, is for the arbitrator to decide. To the extent that the court identified provisions in the arbitration clause that were substantively unconscionable, it abused its discretion by failing to consider whether these provisions should be severed consistent with the Agreement and the longstanding federal policy favoring arbitration. Alternatively, the district court abused its discretion in denying the Motion to Transfer Venue because the parties agreed to venue in Fulton County, Georgia pursuant to a valid, mandatory forum selection clause in the Agreement.

ARGUMENT AND CITATION OF AUTHORITY

I. Standard of Review

The appropriate standard of review for a district court's decisions about the arbitrability of claims is *de novo*. *Momot v. Mastro*, 652 F.3d 982, 985 (9th Cir. 2011). Under California law, courts have discretion to sever an unconscionable provision or refuse to enforce the contract in its entirety, and the court's decision will be reviewed for an abuse of discretion. *Trivedi v. Curexo Technology Corp.*,

189 Cal. App. 4th 387, 398 (2010). The appropriate standard of review for a district court ruling on a motion to transfer venue is abuse of discretion. *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987).

II. The district court erred by denying enforcement of the arbitration clause.

The Federal Arbitration Act ("FAA") provides that 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. The FAA represents "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (quotations and citations omitted). In that regard, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In light of this policy, arbitration clauses are to be "rigorously enforced." *Perry v. Thomas*, 482 U.S. 483, 491 (1987).

The FAA further represents congressional intent "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 489 (citations omitted). The FAA fully applies to employment contracts. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Therefore, unless a savings clause in 9 U.S.C. § 2 applies, the arbitration clause contained in the parties' Agreement must be enforced.

In challenging the arbitration clause, Appellees can only overcome the strong federal policy favoring arbitration if they can establish "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (noting that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate *arbitration agreements* without contravening § 2") (emphasis added). That is, the validity of an arbitration agreement is a question of contract interpretation, and thus governed by state law. *See Circuit City Stores*, 279 F.3d at 892 (9th Cir. 2002).

The district court declined to order arbitration in this case because it found that the Agreement at issue was an adhesion contract, was procedurally and substantively unconscionable, and was illegal. (1 ER 1-11).

A. The district court erred in ruling on the entire agreement.

As a preliminary matter, the only issue raised in Carter Brothers' motion at the district court is the validity of the arbitration clause itself. (*See* 2 ER 139-140; 2 ER 29). Thus, the only inquiry is whether or not the arbitration clause itself, not the agreement as a whole, is invalid under state law. As the Supreme Court stated in *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012), "when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the

validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a federal or state court" (punctuation and citations omitted). The arbitration clause is the only contractual provision that is "subject to initial court determination." *Id*.

The Supreme Court has recognized two types of challenges to the validity of arbitration agreements: (1) challenges to "the validity of the agreement to arbitrate," and (2) challenges to "the contract as a whole." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006). When, as here, "the crux of the complaint challenges the validity or enforceability of the agreement containing the arbitration provision, then the question of whether the agreement, as a whole, is unconscionable must be referred to the arbitrator." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1263-64 (9th Cir. 2006). This is so because, "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445 (2006). Accordingly, the validity of an arbitration provision "is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide. *Nitro-Lift Techs.*, 133 S.Ct. at 503. The district court erred by considering the validity of both the arbitration clause and the agreement as a whole. (1 ER 4).

B. The district court erred in finding that the arbitration clause is unconscionable.

Under California law, "unconscionability analysis begins with an inquiry into whether the contract is one of adhesion." *Armendariz v. Found. Health Psychare Services, Inc.*, 24 Cal. 4th 83, 113 (2000). Additionally, "unconscionability has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Id.* Both procedural and substantive unconscionability 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.* However, substantive and procedural unconscionability "need not be present in the same degree." *Id.* The unconscionability analysis involves a sliding scale: "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

1. *The district court erred in finding the agreement is procedurally unconscionable and only considered whether the contract was adhesive and failed to consider the factors of surprise and oppression.*

In conducting an analysis of procedural unconscionability, a court first determines whether the agreement at issue is a contract of adhesion. *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1570 (2009). However, "[a] procedural unconscionability analysis also includes consideration of the factors of surprise and

oppression." *Id.* at 1571. In the instant case, while the applicable contract has some adhesive aspects, the factors of surprise and oppression are absent such that Appellees can only establish a minimal amount of procedural unconscionability.

i. In the employment context, the vast majority of contracts are, to some extent, contracts of adhesion.

A contract of adhesion is "a standardized contract, 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." *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 817 (1981) (citations omitted). The California Supreme Court has recognized that, in the context of employment, most contracts have indicia of adhesion. *See e.g.*, *Armendariz*, 24 Cal. 4th at 115 (finding that, "in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute . . .").

In the instant case, John Carter, CEO of Carter Brothers, stated that the Appellees were required to sign the Independent Contractor Agreements before beginning work. (2 ER 130). Accordingly, Carter Brothers acknowledges that, as in most contracts in the employment context, the Agreements have some adhesive elements. Nonetheless, "[t]he adhesive nature of the contract will not always make it procedurally unconscionable." *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1470 n.2 (2009).

The conclusion that a contract is one of adhesion "heralds the beginning, not the end, of [a court's] inquiry into its enforceability." *Parada*, 176 Cal. App. 4th at 1571. The district court erroneously equated a finding that a contract is one of adhesion with a finding of procedural unconscionability. (1 ER 8-9). However, California courts have recognized that contracts of adhesion are "not *per se* oppressive." *Cal. Grocers Assn. v. Bank of Am.*, 22 Cal. App. 4th 205, 214 (1994). "A procedural unconscionability analysis also includes consideration of the factors of surprise and oppression." *Parada*, 176 Cal. App. 4th at 1571 (citations omitted). The district court failed to consider the factors of oppression and surprise.

ii. Appellees have not established oppression because they cannot show that they lacked "meaningful choice" or "reasonable market alternatives."

Under California law, "[o]ppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532 (1997). "Oppression refers not only to an absence of power to negotiate the terms of a contract, but also to the absence of reasonable market alternatives." *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1320 (2005).

With respect to the "reasonable market alternatives" prong of the oppression analysis, the court in *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d 758, 772 (1989) held "that the 'oppression' factor of the procedural element of unconscionability may be defeated, if the complaining party has a meaningful

choice of reasonably available alternative sources of supply from which to obtain the desired goods and services free of the terms claimed to be unconscionable." Appellees did not provide any evidence suggesting that reasonable market alternatives (viz., employment contracts not including an arbitration clause) existed. However, individual Appellees refer to other market opportunities that existed contemporaneous with their work as independent contractors with Carter Brothers. (*See e.g.*, 2 ER 84) (noting that Carter Brothers' "competitor, Speedwire, was giving overtime and more benefits than [the contractors at Carter Brothers] were getting"). Thus, while Appellees acknowledge that other market opportunities existed, they do not present any evidence that these other positions would not have been subject to an arbitration clause. Accordingly, to the extent that "oppression" is distinct from the adhesion element in the procedural unconscionability analysis, Appellees failed to meet their burden for this prong.

iii. The prominence and clarity of the arbitration clause in the Agreement undermines the Appellees' allegations of surprise.

The next step in the procedural unconscionability analysis is evaluating the factor of surprise. "Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." *Morris*, 128 Cal. App. 4th at 1321. *See also Roman*, 172 Cal. App. 4th at 1471 (finding limited procedural unfairness despite adhesive nature of the contract where the arbitration provision was "not buried in a lengthy

employment agreement" but was conspicuously set forth). Moreover, "[a]rbitration itself is a fairly common means of dispute resolution and would not be beyond the reasonable expectation of the weaker party." *Parada*, 176 Cal. App. 4th at 1571 (2009).

Appellees' claim of surprise is incongruous with the stark contrast between the arbitration clause and the other provisions in the Agreement. In the instant case, the arbitration clause is easily visible. Indeed, the entire "Resolution of Disputes" provision of the contract is capitalized, and constitutes more than one and a half pages of the nine page Agreement. (2 ER 124-125). *See Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007) (finding no "surprise or concealment" where "terms were not concealed in an employee handbook" and the binding nature of the clause was "in bold and uppercase text" that was "not buried in fine print").

In substance, the language surrounding arbitration is straightforward. The language is not complex, and it provides sufficient detail to inform contractors of the import of this clause. If mediation between the parties is not successful, any dispute between the parties "SHALL BE SUBMITTED BY THE PARTIES TO JAMS, OR ITS SUCCESSOR, FOR FINAL AND BINDING ARBITRATION . . ." (*See* 2 ER 125) (emphasis in original). The provision specifically references the FAA. (2 ER 125). And it provides the rules that will govern: "THE

ARBITRATION SHALL BE ADMINISTERED BY JAMES [sic] PURSUANT TO ITS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES. (2 ER 125) (emphasis in original). *See e.g., Trend Homes, Inc. v. Superior Court*, 131 Cal. App. 4th 950, 959 (2005) (finding no surprise where "the provision is clearly written, entirely capitalized, and easily understood").

Appellees claim surprise because the applicable arbitration rules were "not attached to or contained within the Agreements, and the Agreements do not tell the technicians where they can find them." (2 ER 106). Of course, under California law, "[a] contract may validly include the provisions of a document not physically a part of the basic contract." *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54 (1997). Under California law, "[f]or the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." *Id.*

The arbitration clause satisfies the incorporation requirements of *Shaw*. The arbitration clause specifically references the rules governing the arbitration: "THE ARBITRATION SHALL BE ADMINISTERED BY JAMES [sic] PURSUANT TO ITS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES." (*See* 2 ER 125). Appellees admit that they consented, at least initially, to the

Agreements. (2 ER 66-93). Finally, JAMS' Comprehensive Arbitration Rules and Procedures are readily accessible to Appellees. Indeed, a Google search of either "JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES" – or even "JAMES COMPREHENSIVE ARBITRATION RULES AND PROCEDURES" – yields the same result: both pdf and html versions of the applicable arbitration rules appear in the first two search results. (*See* 2 ER 23-26). For contractors who were well-versed in technology, it is unclear how the applicable arbitration rules were not easily available. *See e.g., Wilson v. United Health Group, Inc.*, 2012 U.S. Dist. LEXIS 174208, *11, n.4, 2012 WL 6088318 (E.D. Cal. Dec. 6, 2012) (finding no procedural unconscionability when "[a] Google search of 'AAA Rules' shows that the AAA Rules appear first in the search results").

Given the prominence of the arbitration clause in the short contract, the clause's clear language, and its proper incorporation of the applicable arbitration rules, Appellees established, at best, a *de minimus* amount of procedural unconscionability. Consistent with the sliding scale analysis used in this context, Appellees must show a significant amount of substantive unconscionability to prevail.

2. *Because the arbitration clauses apply equally to both parties, Appellees cannot show substantive unconscionability.*

"Substantive unconscionability addresses the fairness of the term in dispute.

Substantive unconscionability traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100 (2002). "The paramount consideration in assessing [substantive] conscionability is mutuality." *Nagrampa*, 469 F.3d at 1281 (citations and punctuation omitted).

In the instant case, the provisions of the arbitration clause apply equally to both parties in all respects. First, the types of disputes subject to arbitration are the same for both parties. The arbitration clause applies to "ANY DISPUTE, CLAIM OR CONTROVERSY ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE BREACH, TERMINATION, ENFORCEMENT, INTERPRETATION OR VALIDITY THEREOF, INCLUDING THE DETERMINATION OF THE SCOPE OR APPLICABILITY OF THIS ALTERNATIVE DISPUTE RESOLUTION PROVISION . . ." (2 ER 124). Second, the Agreement enables either party to invoke arbitration: "EITHER PARTY MAY INITIATE ARBITRATION . . ." (2 ER 125). Third, the parties both share responsibility for selecting arbitrators: "FOR SELECTION OF A PANEL OF THREE (3) ARBITRATORS, EACH PARTY SHALL BE GIVEN A LIST OF THE SAME SEVEN (7) PROPOSED ARBITRATORS BY JAMS, EACH PARTY SHALL BE ENTITLED TO STRIKE TWO (2) ARBITRATORS FROM THE PANEL, AND THE REMAINING THREE (3) ARBITRATORS

SHALL SERVE AS THE ARBITRATION PANEL." (2 ER 125). Fourth, each party is responsible his attorney's fees: "IN ANY DISPUTE ARISING UNDER THIS AGREEMENT, EACH PARTY SHALL BEAR ITS OWN ATTORNEY'S FEES." (2 ER 125). Under California law, arbitration agreements only require a "modicum of bilaterality" to be enforceable. *Armendariz*, 24 Cal. 4th at 117. As these provisions demonstrate, the applicable arbitration clause shows more than a modicum of bilaterality; it is perfectly mutual.

With respect to the arbitration clause, the district court found the following terms were substantively unconscionable: (1) requiring Plaintiffs to travel; (2) requiring Plaintiffs to pay for one-half of the arbitration costs and fees; (3) requiring Plaintiffs to consent to jurisdiction in a venue that has no relation to where the work was performed; (4) failing to notify the Plaintiffs that by agreeing to binding arbitration they may forfeit substantial rights, such as potentially waiving their right to class arbitration; and (5) requiring the losing party to pay for the costs of moving for arbitration. (1 ER 9). The district court also found that the contractual provisions concerning indemnification, non-competition, and governing law, which are not related to the arbitration clause, were substantively unconscionable. (1 ER 9).[3]

[3] Insofar as the district court considered and evaluated additional terms of the Agreement other than the arbitration provision, the court erred in conducting the unconscionability analysis. *Nitro-Lift Techs.*, 133 S. Ct. at 503.

First, fee-splitting provisions of arbitration clauses are not necessarily unconscionable. *See e.g.*, *Nagrampa*, 469 F.3d at 1285 (citing Cal. Civ. Proc. Code § 1284.2, which provides a default rule that administrative costs of arbitration are split equally and noting that "[a] fee-splitting provision is not *per se* substantively unconscionable under California law"). Indeed, if Carter Brothers had agreed to pay the expenses of arbitration, that would have certainly been evidence showing an absence of mutuality. These clauses are unconscionable only to the extent they impede Appellees' ability to "vindicat[e] statutory rights." *Nagrampa*, 469 F.3d at 1285. Appellees have not advanced any specific evidence suggesting that the costs associated with the arbitrator would impede their ability to pursue their rights. In the absence of such evidence, Appellees failed to show how this fee-splitting provision, which California law itself expressly contemplates, is substantively unconscionable.

Furthermore, insofar as the district court ruled that the fee-sharing provisions are "financially onerous conditions" that impose "fees and costs [that] are likely much larger than any of the Plaintiffs' individual wage claims," this was error. (1 ER 9). In *Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 844 (2010), the court rejected a similar claim that "the individual amounts at issue [were] so small that a class action is the only viable remedy." Assuming *arguendo* that this was true, the court explained that the "plaintiffs have *wholly failed to introduce*

any evidence as to the size of the amounts." *Id.* (emphasis in original). In the absence of this evidence, plaintiffs failed to establish "the prerequisite to their theory of substantive unconscionability—that the claims are so small that a class action is the only viable means of enforcement." *Id.* Of course, in the instant case, Appellees similarly fail to allege the amounts of their individual claims. (2 ER 66-93). This failure invites speculation, but it does not support a claim of substantive unconscionability.

The district court's objection to the arbitration clause on the grounds that it failed to "provide notification to the Plaintiffs that by agreeing to binding arbitration they forfeit substantial rights such as potentially waiving their right to class arbitration" has been directly addressed by the United States Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the Supreme Court expressly overruled *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and held that California's state law rule prohibiting class action waivers in arbitration clauses is pre-empted by the FAA because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, *supra*, at 1748. Appellees mistakenly relied on *Concepcion* for the proposition that the Agreement is procedurally unconscionable based on the failure to give notice of the waiver of class action litigation. (2 ER 107). Rather, the United States

Supreme Court clarified that a waiver of class action litigation is permissible under the FAA, and that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1751. Accordingly, a waiver of the right to class arbitration is not *per se* unconscionable.

In regard to the provision awarding fees to the prevailing party seeking to enforce the arbitration provision and one-half of the costs of arbitration, California law specifically allows for recovery of fees in both of these scenarios by statute. *See* Cal. Civ. Code § 1717; *see also Frog Creek Partners, LLC v. Vance Brown, Inc.*, 206 Cal. App. 4th 515 (2012). California Civil Code section 1717 governs awards of attorney fees based on a contract and authorizes an award of attorney fees "[i]n any action on a contract" to the "party prevailing on the contract," if the contract provides for an award of attorney fees. Cal. Civ. Code § 1717(a); *Frog Creek*, 206 Cal. App. 4th at 523. Although Code section 1717 does not allow for recovery of attorney's fees for defeating a petition to compel arbitration in a pending lawsuit where the arbitration has not yet taken place, California courts have awarded attorney's fees under section 1717 for succeeding on a petition to compel arbitration under California Civil Procedure Code § 1281.2 after the arbitration was concluded and the rights of the parties were fully resolved. *Id.* at 524-25, 546. In the case at bar, the arbitration clause provides that the prevailing

party is entitled to recover the fees of the Arbitrators and fees incurred in seeking enforcement of the arbitration provision. (2 ER 125). These provisions are virtually identical to the California statutes permitting recovery of attorney's fees by the prevailing party. Accordingly, the district court erred in finding that these provisions are substantively unconscionable and amount to "financially onerous conditions." (1 ER 9).

Finally, the district court's ruling with respect to the location of the arbitration is erroneous. This Court has yet to rule on the issue of whether a "court should enforce [an] arbitration agreement's venue provision when it calls for arbitration in a location outside of the district in which the action is currently pending." *United States ex rel. Turnkey Constr. Servs. v. Alacran Contr., LLC*, 2013 U.S. Dist. LEXIS 173536, 7, 2013 WL 6503307 (E.D. Cal. Dec. 10, 2013) (*citing Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1271, n.1 (9th Cir. 2002). The Supreme Court has, however, recently stressed the importance of enforcing forum-selection clauses:

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.

Atl. Marine Constr. Co. v. United States Dist. Court, 134 S. Ct. 568, 583

(2013). For this reason, when a Court upholds an arbitration clause, it should enforce the location of the arbitration consistent with the agreement of the parties. *See e.g.*, *Dwyer v. Dynetech Corp.*, 2007 U.S. Dist. LEXIS 71647, 2, 2007 WL 2726699 (N.D. Cal. Sept. 17, 2007) (enforcing arbitration clause requiring arbitration in Florida where "[p]laintiff ha[d] multiple sclerosis and, as a result of his condition, ha[d] some mobility restrictions").

C. To the extent that any of the provisions of the arbitration clause are unconscionable, the district court should have severed those provisions.

As set forth more fully above, the arbitration clause is not unconscionable under California law. However, even if this Court should find that the provisions in the arbitration clause are unconscionable, the objectionable terms may be severed from the rest of the Agreement. In this case, the district court did not even engage in the severability analysis. (*See generally*, 1 ER 1-11).

> If the court determines that the arbitration agreement contains provisions that are unenforceable—either because they violate public policy or because they are unconscionable—it then undertakes the third and final step in the analysis: assessing severability. A court need not void an arbitration agreement in its entirety if the objectionable terms can be severed or restricted.

Abramson v. Juniper Networks, Inc., 115 Cal. App. 4th 638, 652 (2004). Severance is particularly appropriate where, as here "there has been full or partial performance of the contract." *Id.* at 659. California law embraces severance. Cal. Civ. Code § 1670.5(a). To the extent the district court identified procedurally or

substantively unconscionable provisions in the arbitration clause, it abused its discretion by declining to sever the offending provisions in furtherance of the liberal policy in favor of arbitration. The purpose of the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Consistent with this purpose, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. Accordingly, severance would further the policy enshrined in the FAA. *See e.g.*, *Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 848 (N.D. Cal. 2012) (noting that, in considering severance, "the court must consider the federal and state policy in favor of arbitration . . . Therefore, this court finds it appropriate to sever the injunctive relief provision and compel arbitration in accordance with the parties' Arbitration Agreement").

This approach is consistent with the Agreement itself, which contains an explicit severability clause. (2 ER 127); *see Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1179 (S.D. Cal. 2011) (noting that agreement contained a severability clause and finding that, "given the liberal federal policy favoring arbitration, the three substantively unconscionable provisions may be severed from the agreement") (citations omitted) and *Irwin v. UBS Painewebber, Inc.*, 324 F.

Supp. 2d 1103, 1110 (C.D. Cal. 2004) (finding arbitration agreement was procedurally unconscionable because it was a contract of adhesion and finding fee agreement unconscionable, but noting that "[t]he fee provision is easily severable from the remainder of the agreement"). Accordingly, to the extent there are any unconscionable provisions in the arbitration clause, the district court abused its discretion by failing to sever those provisions in accordance with the clear federal policy favoring arbitration.

D. The district court erred in finding that the agreement as a whole is illegal because that is a question for the arbitrator.

Finally, the district court ruled that the entire Agreement had "an unlawful purpose" and "decline[d] to enforce it." (1 ER 11). This was error. As set forth more fully above, as a matter of federal substantive law, arbitration clauses are severable from the contracts that contain them. *Buckeye Check Cashing*, 546 U.S. at 445. Of course, arbitration clauses are not illegal. *See* Federal Arbitration Act, 9 U.S.C. § 1 *et. seq.* Whether the entire contract is illegal and invalid on its face should have been decided by an arbitrator rather than the district court. *See supra*, § II.A.

III. The district court abused its discretion in failing to transfer venue of this case to the northern district of Georgia.

Alternatively, the district court should have transferred venue to the Northern District of Georgia pursuant to the forum selection clause in the Agreement and 28 U.S.C. § 1406. The district court did not even consider these

arguments, but summarily denied Appellant's Motion to Transfer Venue in light of its finding that the Agreements were illegal. (1 ER 11).

A. Venue in the Northern District of Georgia is proper under Federal law because Appellant is a resident of Georgia and the remaining defendants consented to venue in the Northern District of Georgia.

In this case, Appellees have plead federal question jurisdiction pursuant to 28 U.S.C. § 1331. (2 ER 157). Accordingly, venue is decided pursuant to federal law. 28 U.S.C. § 1391(b) places venue in a judicial district where any defendant resides. 28 U.S.C. § 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

In this case, Appellant's principal place of business and all business records are located in Georgia. (2 ER 13-14). The remaining Defendants have all consented to jurisdiction in the Northern District of Georgia. (2 ER 134). Accordingly, venue of this matter lies in the Northern District of Georgia, and the district court abused its discretion in denying the Motion to Transfer Venue.

B. Venue is proper in the Northern District of Georgia pursuant to a valid, mandatory, and reasonable forum selection clause in the applicable agreement.

Fulton County, Georgia is the selected forum in all Carter Brothers' Agreements with Appellees. (2 ER 13). The mandatory forum selection clause in the Agreement requires that this action be transferred to Fulton County because

Appellees have not carried their "heavy burden of proof" to overcome the presumptive validity of the forum selection clause, the district court abused its discretion in failing to enforce the forum selection clause in the Agreement as written. *See, e.g.*, *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972).

"Federal law governs the validity of a forum selection clause." *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996). A forum selection clause is "presumptively valid." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2003) (citations omitted). "The party challenging the clause bears a 'heavy burden of proof' and must 'clearly show that enforcement would be unreasonable and unjust' or that the clause was invalid for such reasons as fraud or over-reaching" *Id.* (citations omitted). The United States Supreme Court has stressed the importance of enforcing forum-selection clauses:

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.

Atl. Marine, 134 S. Ct. at 583. "Absent some evidence submitted by the party opposing enforcement of [a forum selection] clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in

court, the provision should be respected as the expressed intent of the parties." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984).

In this case, the parties indisputably agreed to venue in Fulton County, Georgia for all disputes arising out of the Agreement at issue. Given the presumptive validity of forum selection clauses, the district court abused its discretion in not enforcing the clause and transferring venue. The forum selection clause is valid, mandatory and reasonable. Furthermore, Appellees failed to meet their burden of proving that enforcing the forum selection clause would effectively deny them of their day in court.

First, where venue is specified in a forum selection clause with mandatory language, the clause will be enforced. *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989). The forum selection clause in the Agreement at issue in this case provides: "THESE ALTERNATIVE DISPUTE RESOLUTION PROVISIONS SHALL BE ENFORCEABLE BY ANY STATE OR FEDERAL COURT OF COMPETENT JUSRIDICTION, AND ANY ACTION BROUGHT TO ENFORCE THESE PROVISIONS SHALL BE BROUGHT IN FULTON COUNTY, GEORGIA." (2 ER 125).

In *Docksider*, the critical language in the forum selection clause provided: "Venue of any action brought hereunder shall be deemed to be in Gloucester

County, Virginia." *Docksider*, *supra*, at 763. This Court held that the language of the forum selection clause was mandatory and established Virginia as the exclusive forum. *Id.* at 764.

The applicable language in the Agreement at issue in this case is *identical* to the language in *Docksider* that this court found was mandatory. Because both the agreement in *Docksider*, and the Agreement in this case, use the word "shall" in defining the venue for actions arising under the Agreement, the forum selection clause is mandatory. *See*, *e.g.*, *Docksider*, *supra*, at 764. Accordingly, the Appellees affirmatively agreed to mandatory venue in Fulton County, Georgia, and the district court abused its discretion in failing to even consider the arguments in Appellant's Motion to Transfer Venue.

Second, the Agreement between Carter Brothers and Appellees explicitly applies to "ANY DISPUTE, CLAIM OR CONTROVERSY ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE BREACH, TERMINATION, ENFORCEMENT, INTERPRETATION OR VALIDITY THEREOF. . ." (2 ER 124).

This very phrase, "arising out of or relating to this agreement," is broadly construed. *See*, *e.g.*, *Cape Flattery Ltd. v. Titan Mar. LLC*, 607 F. Supp. 2d 1179, 1186 (D. Haw. 2009) ("The rule is that, where an arbitration clause applies to matters 'arising under' the agreement, its scope is narrowly defined, but where it

applies to matters 'arising out of or relating to' the agreement, its application should be broadly construed."); *Mediterranean Enters. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967)). Because Appellees are seeking damages under the terms of the Agreement, and indeed, are seeking rescission of the Agreement, their claims fall within the broad ambit of this phrase under the applicable law in this Circuit.

Third, enforcement of the Agreement's forum selection clause must be ordered absent a showing by Appellees that the forum selection clause is "unreasonable" for one of the following three reasons: (1) inclusion of the clause was a product of fraud; (2) enforcement would deprive a party of the right to pursue a claim, or (3) enforcement would contravene public policy. *Holland Am. Line v. Wartsila N. Am., Inc.*, 485 F. 3d 450, 457 (9th Cir. 2007).

Appellees never alleged that the forum selection clause in the Agreement is the product of fraud. (2 ER 94-119). General allegations of fraudulent conduct are not sufficient to invalidate a forum selection provision. Rather, Appellees must demonstrate that the forum selection provision itself was the direct product of fraud. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) ("In *The Bremen* we noted that forum-selection clauses 'should be given full effect' when 'a freely negotiated private international agreement [is] unaffected by fraud . . . . This

qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.'" (citations omitted)). Appellees cannot make this showing, and did not even try to do so at the district court. Thus, the forum selection clause cannot be invalidated on this basis.

Appellees' only argument at the district court against enforcing the forum selection clause is that it would substantially impair the rights of Appellees because Georgia law purportedly imposes limits on potential class members' ability to recover damages. (2 ER 109-114). However, enforcement of the Agreement's valid forum selection clause does not mean that Georgia's substantive law will necessarily be applied. Like California, Georgia follows the Restatement (Second) of Conflict of Laws, which means that the choice of law analysis in Fulton County, Georgia would be the same as it would be in California federal court. *General Tel. Co. of Southeast v. Trimm*, 728 F.2d 494, 496 (11th Cir. 1984). To decide to apply California law, the court would first have to invalidate the parties' agreement to be governed by Georgia law, and then decide, based on the same choice of law analysis, that California law is appropriate. Georgia courts have the power, when appropriate, to apply California law, and they have routinely

done so. *See, e.g.*, *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1539 (11th Cir. 1983). Accordingly, enforcement of the forum selection clause does not deprive Appellees of the right to pursue their claims.

Finally, Appellees also failed to demonstrate that "public policy" is somehow violated by enforcing the parties' Agreement. While Appellees may be California residents, if this case is certified as a class action, the majority of the putative class members are not. Most of Carter Brothers' documents and corporate witnesses are located in Georgia. (2 ER 14). Thus, it is not "gravely difficult" for Appellees to litigate in Georgia (as they agreed to do) instead of California, and Appellees cannot meet the heavy burden required to show they would be "effectively deprived of their day in court" if the forum selection clause were enforced. *See, e.g.*, *Bremen*, 407 U.S. at 19. Accordingly, Appellees failed to establish that the forum selection clause is unreasonable and the district court abused its discretion in failing to transfer venue to the Northern District of Georgia.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the district court's Order denying the Motion to Compel Arbitration and to Transfer Venue.

STATEMENT OF RELATED CASES

Appellant is not aware of any other cases pending in this Court related to this appeal.

Respectfully Submitted, this 29th day of June, 2015.

GORDON & REES LLP

s/ Jeffrey W. Melcher
By: Jeffrey W. Melcher
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32 (a)(7)(B) of the Federal Rules of Appellate Procedure, I certify that this Brief contains no more than 14,000 words. Based on the word count of the word processing system used to prepare this Brief, the word count, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) is 7,085 words.

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32 (a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32 (a)(6) because this Brief has been prepared in a proportionally spaced font that includes serifs using Microsoft Word in 14 point Times New Roman font.

s/ Jeffrey W. Melcher
By: Jeffrey W. Melcher

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing APPELLANT'S BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system on June 29, 2015.

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

s/ Jeffrey W. Melcher
By: Jeffrey W. Melcher