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 REPLY BRIEF

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This appeal arises from the district court's erroneous denial of Appellant's Motion to Compel Arbitration. In addition to the arguments set forth in Appellant's Brief, this Court's recent ruling in *Brennan v. Opus Bank*, 796 F.3d 1125, No. 13-35580, No. 13-35598, 2015 U.S. App. LEXIS 14039 (9th Cir. Aug. 11, 2015)[1] further requires reversal of the district court's ruling. The district court's ruling should be reversed for several reasons. First, the parties undeniably agreed to arbitrate the question of arbitrability. Second, the arbitration agreement is neither procedurally nor substantively unconscionable. But, even if the arbitration agreement is unconscionable, the offending provisions can be severed to allow for enforcement of the agreement. Finally, the district court abused its discretion in failing to transfer venue to the Northern District of Georgia pursuant to the venue provision in the agreement and constitutional venue provisions.[2] Accordingly, Appellant respectfully requests that this Court reverse the district court's decision.

[1] As discussed herein, *Brennan* held that where the parties agree to arbitrate the question of arbitrability, as the parties have in this case, the district court must grant the motion to compel arbitration. Subsequent references to *Brennan* will cite to the Lexis citation.

[2] Appellant incorporates and stands by its arguments as set forth in its opening brief in regard to the Motion to Transfer Venue.

ARGUMENT AND CITATION OF AUTHORITY

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

A. The district court erred in denying arbitration because the parties agreed to arbitrate questions of arbitrability.

Appellant admits that questions of arbitrability are typically for the court to decide. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002). But, in a recent decision on point with the instant case, this Court held that that a court must enforce an agreement that delegates arbitrability questions to the arbitrator. *Brennan v. Opus Bank*, No. 13-35580, No. 13-35598, 2015 U.S. App. LEXIS 14039 (9th Cir. August 11, 2015). In *Brennan*, this court held that the federal substantive law of arbitrability applies to any contract evidencing a transaction involving commerce, absent clear and unmistakable evidence that the parties agreed to apply non-federal arbitrability law. *Id.* at *10. Furthermore, the gateway issues of whether there is an arbitration agreement, and whether the agreement covers the dispute at issue, can be delegated to the arbitrator where "the parties clearly and unmistakably provide otherwise." *Id.* at *12.

In *Brennan*, the Plaintiff entered into an employment agreement which included an arbitration provision. at *6-7.[3] The employment agreement expressly

[3] The federal substantive law of arbitrability applies because the agreement at issue in *Brennan* did not specify that California law applies, and the contract evidences a transaction in commerce. *Brennan*, *supra*, at *11.

incorporated the Rules of the American Arbitration Association. *Id.* at *7. Under those rules, the arbitrator was granted authority "to rule on his or her own jurisdiction, including any objections with respect to the . . . validity of the arbitration agreement." *Id.* at *7-8. Ultimately, this court held that the "incorporation of the AAA rules constitute[d] clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability." *Id.* at *13-14.

Brennan should control this case. The arbitration provision in this case is even more clear than the *Brennan* agreement. The instant agreement between Carter Brothers and Appellees specifically 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). Moreover, by its express terms, the subject arbitration clause in this case is "ENFORCEABLE PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. § 1 ET. SEQ.). THE PARTIES AGREE THAT THIS AGREEMENT AFFECTS INTERESTATE (sic) COMMERCE." (2 ER 125).

Thus, the parties in this case agreed to apply the federal substantive law of arbitration and to arbitrate the issue of arbitrability. Accordingly, the only

determination the district court could make was with regard to the gateway issues of whether there is an arbitration agreement that covers the dispute at issue. The parties agreed to delegate all other issues to the arbitrator. *See*, *e.g.*, *Brennan*, *supra*, at *14.

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

The only issue raised in Carter Brothers' motion in the district court was the validity of the arbitration clause itself. (*See* 2 ER 139-140; 2 ER 29). As set forth above, the gateway issues on a motion to compel arbitration are whether there is an agreement to arbitrate and whether the dispute at issue falls under the arbitration agreement. *Howsam*, *supra*, at 84. Thus, the district court's inquiry should have been limited to the question of whether there was an arbitration agreement between the parties.

As discussed more fully above, the parties agreed to arbitrate the question of arbitrability. *See*, *surpra*, § I.A. As the United States Supreme Court stated in *Nitro-Lift Techs., LLC 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). Accordingly, because the parties agreed to arbitrate the question of arbitrability,

the district court erred by considering the validity of both the arbitration clause and the agreement as a whole. (1 ER 4).

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

The subject arbitration clause is not 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.* Under this framework, the arbitration clause between the parties here is not unconscionable.

1. *Appellees' have established only a minimal level of procedural unconscionability because there is no unconscionable surprise.*

Appellees, and the district court, erroneously equate a finding that the contract is one of adhesion with a finding of procedural unconscionability. (1 ER 8); Appellees' Answering Brief, p. 12. Although the "unconscionability analysis begins with an inquiry into whether the contract is one of adhesion," this conclusion "heralds the beginning, not the end, of [a court's] inquiry into its enforceability." *Armendariz*, 24 Cal. 4th at 113; *Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1571 (2009). 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). Here, the district court failed to consider both of these factors.

Appellees' argue that the agreement satisfies the element of surprise because (1) Appellant did not explain the agreement, and (2) the agreement does not attach or explain the rules for mediation or arbitration. Appellees' Answering Brief, pp. 14 - 17. Neither of these arguments is availing.

a. *Failure to explain the agreement is not unconscionable surprise.*

Appellees argue that the surprise element is satisfied because Appellant did not explain the arbitration agreement. Appellees' Answering Brief, pp. 14-15. As

an initial matter, the declarations cited by Appellees do not show that the agreements are procedurally unconscionable based on the element of surprise. Appellees' Answering Brief, p. 15. At best, the declarations cited by Appellees demonstrate that Appellees signed the agreements without attempting to gain any clarification or explanation about the terms of the agreement. Appellees' Answering Brief, p. 15.

The California Supreme Court has held that Appellant "was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to [Appellees'] attention." *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 914 (2015). Moreover, it is axiomatic that the onus is on the signatory to a contract to read it before signing, or have it read to him. *See*, *e.g.*, *Randas v. YMCA of Metro. LA*, 17 Cal. App. 4th 158, 21 (Cal. Ct. App. 1993); *see also Kilgore v. KeyBank, N.A.*, 673 F.3d 947 964 (9th Cir. 2012) ("We invoked the general rule . . . that one who signs a contract is bound by its provisions and cannot complain of unfamiliarity with the language of the instrument.") (citations omitted).[4] This rule also applies in the context of arbitration agreements. *See*

[4] To the extent that California law limits the application of this general rule in the context of contracts of adhesion, such limitation is not applicable unless the arbitration agreements at issue are "conspicuous, plain and clear" and will not operate to defeat the reasonable expectations of the parties. *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 710 (1976). As set forth more fully in Appellant's opening brief, the arbitration clause in this case is prominent and conspicuous within the agreement.

Jackson v. TIC- The Indus. Co., 2014 U.S. Dist. LEXIS 39460 at 16-17 (E.D. Cal. 2014); *Reilly v. WM Financial Servs., Inc.*, 95 F.App'x 851, 852-53 (9th Cir. 2004); *Izzi v. Mesquite Country Club*, 186 Cal.App.3d 1309, 1318 (1986). Accordingly, Appellees cannot escape their contractual obligation to arbitrate simply because they failed to seek additional information or clarification.

b. *Failure to attach arbitration rules is not unconscionable surprise.*

Appellees' further argue that the surprise element is satisfied because the agreement does not attach the rules for mediation or arbitration. Appellees' Answering Brief, p. 16. It is well settled that the FAA does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). Likewise, this court held in *Brennan*, *supra*, at *13-14 that incorporation of the [Rules of the American Arbitration Association] was not only permissible, but "constitutes clear and unmistakable evidence that the contracting parties agreed to arbitrate arbitrability."[5]

Indeed, both federal and state courts in California have held on multiple occasions that the failure to attach a copy of the arbitration rules does not render

[5] The arbitration agreement at issue in *Brennan*, *supra*, incorporated the Rules of the AAA, and under those Rules, the question of arbitrability is for the arbitrator. *Brennan*, *supra*, at *7-8. There is no question in *Brennan* whether the incorporation of the AAA Rules is unconscionable.

the agreement procedurally unconscionable. *See Lane v. Francis Capital Management LLC*, 224 Cal. App. 4th 676, 681 (2014) ("There could be no surprise, as the arbitration rules referenced in the agreement were easily accessible to the parties - the AAA rules are available on the Internet."); *Jackson v. TIC- The Indus. Co.*, 2014 U.S. Dist. LEXIS 39460 at 20 (E.D. Cal. 2014) ("incorporation of the AAA rules does not mandate a finding that TIC's arbitration provision is procedurally and substantively unconscionable."); *Ulbrich v. Overstock.com, Inc.*, 887 F. Supp. 2d 924, 932-933, 2012 U.S. Dist. LEXIS 122504, *16 (N.D. Cal. 2012) ("Under general California rules of contract interpretation, matters like the AAA rules can be incorporated into a contract by reference, provided the incorporation is clear and the incorporated rules are readily available."); *Ruhe v. Masimo Corp.*, 2011 U.S. Dist. LEXIS 104811 at *10-11 (C.D. Cal. 2011) (finding no procedural unconscionability where the arbitration agreement incorporated the JAMS rules, agreement clearly stated that arbitration would occur under the JAMS rules, and the JAMS rules are easy to locate in an online search.).

Thus, Appellees' arguments regarding unconscionability on the basis of surprise must fail. Appellees have established, at best, a *de minimus* amount of procedural unconscionability, and must show show a significant amount of substantive unconscionability to prevail. Appellees have not met this heavy burden.

2. *The arbitration clause is not substantively unconscionable because it is perfectly mutual and bears more than the requisite modicum of bilaterality under California law.*

The subject agreement is not substantively unconscionable. "Substantive unconscionability addresses the fairness of the term in dispute . . . [and] 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 v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006) (citations and punctuation omitted). In the instant case, the arbitration clause is not unconscionable as the provisions of the arbitration clause apply equally to both parties in all respects.

a. *The fee splitting provisions are not substantively unconscionable because they are mutual and allowed under California law.*

Appellees argue that the subject agreement is substantively unconscionable because they would have to bear certain financial costs that "forecloses accessible and affordable dispute resolution for [] low wage workers." Appellees' Answering Brief, pp. 20-25. However, "fee splitting provisions are not *per se* substantively unconscionable." *Nagrampa*, *supra*, at 1281. Indeed, even "the 'risk' that [Appellees'] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Green Tree Fin. Corporation-Alabama*

v. Randolph, 531 U.S. 79, 92 (2000); *see also Kilgore v. KeyBank N.A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (no substantive unconscionability based on the assertion that students may not be able to afford arbitration fees).

Finally, in regard to fee provisions in an arbitration agreement, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), the California Supreme court held that an "arbitration agreement that contains within its scope the arbitration of [statutory] claims impliedly obliges the employer to pay all types of costs that are unique to arbitration." *Armendariz*, *supra*, at 113. Significantly, despite the fee provisions in the *Armendariz* arbitration clause requiring each party to pay his pro rata share of the expenses and fees of the neutral arbitrator, the court "interpret[ed] the arbitration agreement as providing . . . that the employer must bear the arbitration forum costs." *Id.*

After the *Armendariz* court engaged in a full unconscionability analysis of the remaining terms of the arbitration agreement, it found that the provisions limiting the scope of arbitrable claims and the limitation on recovery of contract damages (as opposed to statutory damages) caused the agreement to be unconscionable. *Id.* at 120-121. Notably, the court did *not* include the limitation on statutory damages, the limitation on discovery, or the fee splitting provision in its findings regarding unconscionability because it *already inferred the appropriate statutory protections into the agreement* despite the express provisions in the

agreement as written. *Id.*

In this case, to the extent that Appellees have alleged statutory claims that are inconsistent with the terms of arbitration agreement, the court can permissibly infer the appropriate statutory protections without invalidating the entire arbitration agreement. *See*, *e.g.*, *Armendariz*, *supra*.

b. *The United States Supreme Court has disapproved mandatory class arbitration.*

Appellees also argue that the agreement is unconscionable because it fails to give notice of the class action waiver. Appellees' Answering Brief, pp. 26-27. Both the United States Supreme Court and the California Supreme Court have approved class action arbitration waivers. *See AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2010); *Sanchez*, *supra*, at 923. Notably, Appellees do not point to any controlling authority supporting their proposition that the arbitration agreement is unconscionable because it fails to provide notice of the waiver to class action arbitration. Rather, Appellees' blithely state that this alleged lack of notice is a generally applicable contract defense. Appellees' Answering Brief, p. 26.

But again, the United States Supreme Court squarely addressed the issue of class arbitration in *Concepcion*, *supra*. Although there is no case law regarding the issue of notice as argued by Appellees and the district court, the Supreme Court engaged in an exhaustive analysis of the reasons why class arbitration is disfavored and is not truly "arbitration as envisioned by the FAA." *Concepcion*, *supra*, at

1752. The court reasoned that because class arbitration is more complex, costly, and lengthy than individual arbitration, it "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Id.* at 1752. Specifically, the court noted that class arbitration is more procedurally complex, more expensive, slower, lengthier, and requires more procedural formality to ensure adequate representation of absent members, all of which sacrifice the principal advantages of arbitration. *Concepcion*, *supra*, at 1751. Accordingly, to the extent that Appellees argue in favor of their right to class action arbitration, the United States Supreme Court has held that class action arbitration is inconsistent with the intent of the FAA. *Concepcion*, *supra*, at 1751.

D. 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 and in Appellant's opening brief, the arbitration clause is not unconscionable under California law. But, even if, *arguendo*, this Court finds that the provisions in the arbitration clause are unconscionable, the objectionable terms may be severed, allowing the remainder of the agreement to survive.

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).

California law embraces severance. Cal. Civ. Code § 1670.5(a). Severance is particularly appropriate where, as here, "there has been full or partial performance of the contract." *Id.* at 659. This approach is consistent with the Agreement itself, which contains an explicit severability clause. (2 ER 127). 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.

Appellees' argue that the arbitration agreement contains numerous unlawful provisions, and that the agreement's lack of mutuality permeates the entire agreement so that no single clause can be severed. Appelees' Answering Brief, pp. 27-28. According to Appellees, under *Armendariz*, *supra*, the Court would have to completely rewrite the agreement to enforce it. This is an erroneous reading of *Armendariz*.

In *Armendariz*, the California Supreme Court addressed multiple unconscionable provisions in an arbitration agreement that are not present here. The arbitration clause in *Armendariz* limited statutorily imposed remedies, abbreviated discovery, and contained fee splitting provisions. *Armendariz*, *supra*,

at 103-104, 106. However, the court ruled that "an agreement to arbitrate a statutory claim implicitly incorporates 'the substantive and remedial provisions of the statute' so that parties to the arbitration would be able to vindicate 'their statutory cause of action in the arbitral forum,'" and "infer[red] that when parties agree to arbitrate statutory claims, they also implicitly agree . . . to such procedures as are necessary to vindicate the claim." *Id.* at 106. The court then concluded that "lack of discovery is not grounds for holding a [statutory] claim inarbitrable." *Id.* Finally, the court "interpret[ed] the arbitration agreement as providing . . . that the employer must bear the arbitration forum costs." *Id.* at 113. Notably, the court did *not* find that these provisions were unconscionable. Rather, the court inferred the respective statutory provisions, notwithstanding the agreement's explicit terms. *Id.*

The provisions that the *Armendariz* court found to be unconscionable are simply not present in this case. There is no limitation on the scope of arbitrable claims in favor of either party, and there is no limitation on recovery of any damages under the agreement at issue in this case. After inferring the appropriate statutory provisions regarding discovery and fees into the agreement here, as permitted by *Armendariz*, there are no unconscionable terms in the arbitration clause. Even if this Court should find that there are unconscionable provisions, the district court erred in failing to engage in the severability analysis.

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.

REQUEST FOR ORAL ARGUMENT

Appellant requests that this appeal be set for oral argument. Oral argument will assist the Court in understanding the factual and legal issues presented in this appeal.

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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)(ii) of the Federal Rules of Appellate Procedure, I certify that this Brief contains no more than 7,000 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 3,531 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 REPLY 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 October 13, 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

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